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## Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements

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# Thou Shalt Not Take the Name of the Lord Thy God in Vain: Use and Abuse of Religious Exemptions from School Immunization Requirements

DORIT RUBINSTEIN REISS\*

*School immunization requirements are one way that states protect school age children against vaccine-preventable diseases. At present, forty-eight states allow parents to exempt their students from immunization requirements based on religious reasons, philosophical reasons, or either. This Article focuses on the religious exemption and makes three points. First, people lie to get a religious exemption. Second, U.S. jurisprudence makes preventing such abuse very hard. And third, because the religious exemption is so prone to abuse, we should remove it. The first part of the Article discusses the jurisprudence, and why our courts limit state officials' ability to police abuse of the religious exemption. The Article then uses three sources to argue that religious exemptions are widely abused: survey data describing the reasons people do not vaccinate, the positions of established religions about vaccines, and posts from Facebook stating the poster lied to obtain a religious exemption. The Article concludes by discussing three potential solutions to the problem of widespread abuse of the religious exemption: tightening the scrutiny of requests for religious exemptions, limiting exemptions to medical exemptions only, and providing only a personal choice exemption. The Article is skeptical about whether tightening scrutiny is appropriate or constitutional, but sees the latter two options as offering a different balance of benefits and costs, though the author has a slight preference for a hard to obtain personal choice exemption.*

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## INTRODUCTION

In a recent survey of school immunization exemptors<sup>1</sup> from New Mexico, fifty-four percent of respondents described their reasons for

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1. Exemptors are parents who obtain an exemption from school immunization requirements, not vaccinating their children before sending them to school.

seeking an exemption from school immunization requirements as “philosophical” or based on “personal beliefs.”<sup>2</sup> The main reasons for their objection to vaccines were safety concerns—such as concerns that vaccines “might cause harm,” “contain dangerous/toxic ingredients,” or “may overwhelm the immune system”—together with a general belief that natural immunity is in some way “better.”<sup>3</sup>

The problem is that New Mexico does not have a philosophical exemption; it only has religious and medical exemptions.<sup>4</sup> Thus, the people responding to the survey, all of whom had successfully obtained exemptions in New Mexico, had to have claimed one or the other of the two allowable grounds, even though their reason for not vaccinating was neither medical nor religious.

With over 1.2 billion users<sup>5</sup> and several dedicated anti-vaccine pages, Facebook provides a place for anti-vaccine activists—a very, very small minority—to create a community of like-minded people who can converse and express their views. Facebook also provides a forum for individuals to offer advice about obtaining vaccination exemptions. In response to a request for advice on how to exempt someone from school immunization requirements, one online commentator said, “She is going to have to lie. If you give any vaccine even 1 shot [sic] they say it can’t be religious beliefs. I had to do a bit of Photoshop work to make the records say they have NEVER had any shots.”<sup>6</sup>

This Article argues that, like this commentator and the New Mexico exemptors, many of those who claim a religious exemption lie—their real reasons for not wanting to vaccinate their children are not religious. Since the religious exemption, in its current format, is so easily and commonly abused, this is inappropriate.

People lie to the government in many contexts, of course. But when a statutory exemption is easily and widely abused in ways that undermine the goals of the statute and may lead to substantial harm, it is probably time to consider changing the law. All the more so when the states have substantial leeway to choose their own course.

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2. *Department of Health Announces Results of Vaccine Exemption Survey*, N.M. DEP’T OF HEALTH (Nov. 18, 2013), <http://archive.nmhealth.org/CommunicationsOffice/2013%20News%20Releases/NMDOH-PressRelease-20131118-VaccineExemptionSurvey-EN.pdf>.

3. *Id.*

4. *Id.*; see N.M. STAT. ANN. § 24-5-3 (West 2014).

5. Jemima Kiss, *Facebook’s 10th Birthday: From College Dorm to 1.23 Billion Users*, THE GUARDIAN (Feb. 3, 2014), <http://www.theguardian.com/technology/2014/feb/04/facebook-10-years-mark-zuckerberg>.

6. See *infra* Appendix A, Figure 1 (capitalized in original). All of the comments located in Appendix A come from public pages on Facebook. Pursuant to an Institutional Review Board (“IRB”) exemption, these comments have been included with the names and pictures of the posters hidden and without citations to the original Website to protect the poster’s anonymity.

Vaccines save lives. They prevent countless harms and suffering. There are not a lot of ways around that reality.<sup>7</sup> Before the pertussis vaccine was available, the United States had an average of 200,000 cases and 4000 deaths annually—mostly in babies—from this disease.<sup>8</sup> Before the polio vaccine, the United States had an average of almost 20,000 cases of this horrible disease each year, with an average of over 1800 deaths.<sup>9</sup> Before the development of the *Haemophilus influenzae* type b (“HiB”) vaccine, there were about 20,000 cases each year, with about 1000 deaths,<sup>10</sup> and additional cases of brain damage and other harms.<sup>11</sup>

Today, all of those diseases are extremely rare (even though for somewhat complex reasons, pertussis—whooping cough—is making a comeback).<sup>12</sup> High rates of immunization are an important part of this reality. Not only are vaccinated people less likely to catch the disease themselves, but also, if enough people are immunized, the disease cannot gain a foothold in a population, protecting even those who are not immune. This phenomenon is called herd immunity, or community immunity.<sup>13</sup> One way to achieve these high rates of immunization is through school immunization requirements: laws requiring children to receive certain vaccines before attending public school.<sup>14</sup> Such laws have withstood challenges on constitutional grounds in the Supreme Court<sup>15</sup> and in every court addressing the issue since.<sup>16</sup>

With the decline of vaccine-preventable diseases, however, the balance has changed. The risks of vaccines, real or imagined, have become more frightening to some than the risks of the diseases that they

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7. For the development and history of vaccines and their many benefits, see Steve P. Calandrillo, *Vanishing Vaccinations: Why Are So Many Americans Opting Out of Vaccinating Their Children?*, 37 U. MICH. J.L. REFORM 353, 363–81 (2004). See generally PAUL A. OFFIT, *VACCINATED: ONE MAN’S QUEST TO DEFEAT THE WORLD’S DEADLIEST DISEASES* (2007) [hereinafter OFFIT, *VACCINATED*] (providing a detailed history of the diseases we vaccinate against, their harms, why and how each vaccine was created, and how each vaccine led to a dramatic decline in the disease).

8. Sandra W. Roush & Trudy V. Murphy, *Historical Comparisons of Morbidity and Mortality for Vaccine-Preventable Diseases in the United States*, 298 JAMA 2155, 2156 tbl.1 (2007).

9. *Id.*

10. *Id.* at 2158 tbl.2.

11. PAUL A. OFFIT, *DEADLY CHOICES: HOW THE ANTI-VACCINE MOVEMENT THREATENS US ALL* xiii (2011) [hereinafter OFFIT, *DEADLY CHOICES*].

12. CTRS. FOR DISEASE CONTROL & PREVENTION, *Pertussis Epidemic — Washington, 2012*, 61 MORBIDITY & MORTALITY WKLY. REP. 517, 517–18 (2012). For more on the decline in disease rate and the life-saving properties of vaccines, see Willem G. van Panhuis et al., *Contagious Diseases in the United States from 1888 to the Present*, 369 NEW ENG. J. MED. 2152, 2154–56 (2013).

13. Calandrillo, *supra* note 7, at 420; Douglas S. Diekema, Commentary, *Choices Should Have Consequences: Failure to Vaccinate, Harm to Others, and Civil Liability*, 107 MICH. L. REV. FIRST IMPRESSIONS 90, 91 (2009).

14. Calandrillo, *supra* note 7, at 381 n.199. See generally Walter A. Orenstein & Alan R. Hinman, *The Immunization System in the United States — The Role of School Immunization Laws*, 17 VACCINE S19 (1999) (providing an overview of school immunization requirements and exemptions).

15. *Zucht v. King*, 260 U.S. 174, 177 (1922).

16. Most recently in *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App’x 348, 357 (4th Cir. 2011).

prevent. Observers explain that vaccines have become “victims of their own success.”<sup>17</sup>

This is especially ironic because by almost every measure, the risks of modern vaccines, while real enough, are small. Indeed, the risks of vaccination are an order of magnitude smaller than the risks of diseases they prevent.<sup>18</sup> To give one example, the risk of encephalitis from measles is one per one thousand cases, according to the Center for Disease Control’s (“CDC”) “Pink Book.”<sup>19</sup> Contrast that statistic with the following Food and Drug Administration (“FDA”) information about the results of vaccinating with the measles, mumps,<sup>20</sup> and rubella (“MMR”) vaccine: “Encephalitis has been reported approximately once for every 3 million doses of MMR vaccine. Post-marketing surveillance of more than 400 million doses distributed worldwide (1978 to 2003) indicates that encephalitis is rarely reported after MMR vaccination.”<sup>21</sup>

To use another measure, it may be useful to compare those statistics with the number of cases compensated by the National Vaccine Injury Compensation Program (“NVICP”). The program, which covers both children and adults, has been in existence for twenty-four years.<sup>22</sup> Approximately four million babies are born in the United States each year,<sup>23</sup> and the majority of them are vaccinated.<sup>24</sup> And yet, NVICP has only compensated 3535 cases in twenty years.<sup>25</sup> This is in spite of the fact that NVICP is clearly a more plaintiff friendly, easy-to-use scheme than

17. See *Bruesewitz v. Wyeth, LLC*, 131 S. Ct. 1068, 1072 (2011); see also Daniel B. Rubin & Sophie Kasimow, Comment, *The Problem of Vaccination Noncompliance: Public Health Goals and the Limitations of Tort Law*, 107 MICH. L. REV. FIRST IMPRESSIONS 114, 118 (2009).

18. For comparisons of the risks of diseases to the risks of vaccines in Australia, see THE AUSTRALIAN IMMUNISATION HANDBOOK, INFORMATION SHEET - COMPARISON OF THE EFFECTS OF DISEASES AND THE SIDE EFFECTS OF NIP VACCINES 527 (Austl. Gov’t Dep’t of Health ed., 10th ed. 2014), available at [http://www.immunise.health.gov.au/internet/immunise/publishing.nsf/Content/EE1905BC65D40BCFCA257B26007FC8CA/\\$File/handbook-Jan2014v2.pdf](http://www.immunise.health.gov.au/internet/immunise/publishing.nsf/Content/EE1905BC65D40BCFCA257B26007FC8CA/$File/handbook-Jan2014v2.pdf) [hereinafter THE AUSTRALIAN IMMUNISATION HANDBOOK]. For Canada, see *Comparison of Effects of Diseases and Vaccines*, PUB. HEALTH AGENCY OF CAN. (July 17, 2012), <http://www.phac-aspc.gc.ca/publicat/cig-gci/cedv-cemv-tab-eng.php>. For the United States, see *Diseases & the Vaccines That Prevent Them*, CTRS. FOR DISEASE CONTROL & PREVENTION (Mar. 12, 2012), <http://www.cdc.gov/vaccines/vpd-vac/fact-sheet-parents.html>; see also Calandrillo, *supra* note 7, at 391–93.

19. CTRS. FOR DISEASE CONTROL & PREVENTION, EPIDEMIOLOGY AND PREVENTION OF VACCINE-PREVENTABLE DISEASES 174 (William Atkinson et al. eds., 12th ed. 2012).

20. The mumps can also cause encephalitis, although in lower rates than measles. *Id.* at 206. For an example of mumps causing encephalitis, see Dorit Reiss, *The Aftermath of Phil’s Mumps*, BEFORE VACCINES (Sept. 29, 2013, 5:58 PM), <http://beforevaccines.blogspot.com/2013/09/the-aftermath-of-phils-mumps.html>.

21. *Measles, Mumps, Rubella and Varicella Virus Vaccine Live*, U.S. FOOD & DRUG ADMIN. (Jan. 11, 2010), <http://www.fda.gov/BiologicsBloodVaccines/Vaccines/QuestionsaboutVaccines/ucm070425.htm>.

22. *Bruesewitz*, 131 S. Ct. at 1074.

23. *Statistical Abstract of the United States: 2012*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/2011pubs/12statab/vitstat.pdf> (last visited Aug. 1, 2014).

24. CTRS. FOR DISEASE CONTROL & PREVENTION, *National and State Vaccination Coverage Among Children Aged 19–35 Months*, 60 MORBIDITY & MORTALITY WKLY. REP. 1157, 1158 (2011).

25. HEALTH RES. & SERVS. ADMIN., U.S. DEP’T OF HEALTH & HUMAN SERVS., STATISTICS REPORTS (Mar. 5, 2014), <http://www.hrsa.gov/vaccinecompensation/statisticsreports.html#Stats>.

civil courts.<sup>26</sup> Compare that number to the approximately 35,000 fatalities—not injuries, just deaths—resulting from car accidents each year.<sup>27</sup> Indeed, Allison Hagood calculated the rate of vaccine injury to be less than 0.003% of vaccines given.<sup>28</sup> Nothing is one hundred percent safe, and a child can suffer a vaccine injury or an allergic reaction, but as explained, those are rare and the risks of not vaccinating are much, much higher.

Over the past decade, rates of nonmedical exemptions from school immunization requirements have increased dramatically.<sup>29</sup> This is problematic because unvaccinated children are at a higher risk of preventable diseases than vaccinated children,<sup>30</sup> and communities with high rates of exemptions are more vulnerable to outbreaks than communities with high vaccination rates.<sup>31</sup>

State policies—the existence of exemptions and the ease of obtaining them—affect exemption rates, and hence, the risk of outbreaks.<sup>32</sup> This Article examines one type of policy that many states have adopted: an exemption from school immunization requirements based on the exemptor's religious beliefs.

States began adopting religious exemptions to school immunization requirements in the 1960s.<sup>33</sup> The first exemptions were adopted to accommodate Christian Scientists and other similar minorities.<sup>34</sup> But the unconstitutionality of offering preferential treatment to certain religions, and the reluctance of judges to allow state officials to inquire into

26. See Bruesewitz, 131 S. Ct. at 1073; see also Christine Vara, *Congressional Briefing Attempts to Discredit Vaccine Injury Compensation*, SHOT OF PREVENTION (Nov. 8, 2013), <http://shotofprevention.com/2013/11/08/congressional-briefing-attempts-to-discredit-vaccine-injury-compensation>.

27. NAT'L SAFETY COUNCIL, INJURY FACTS 2 (2011), available at [http://www.nsc.org/Documents/Injury\\_Facts/Injury\\_Facts\\_2011\\_w.pdf](http://www.nsc.org/Documents/Injury_Facts/Injury_Facts_2011_w.pdf).

28. Allison Hagood, *A Look at the Numbers in Vaccine Reactions*, RED WINE & APPLE SAUCE (Mar. 5, 2013), <http://www.redwineandapplesauce.com/2013/03/05/a-look-at-the-numbers-in-vaccine-reactions/>.

29. Jennifer L. Richards et al., *Nonmedical Exemptions to Immunization Requirements in California: A 16-Year Longitudinal Analysis of Trends and Associated Community Factors*, 31 VACCINE 3009, 3010 (2013).

30. Daniel R. Feikin et al., *Individual and Community Risks of Measles and Pertussis Associated with Personal Exemptions to Immunization*, 284 JAMA 3145, 3149 (2000).

31. Aamer Imdad et al., *Religious Exemptions for Immunization and Risk of Pertussis in New York State, 2000–2011*, 132 PEDIATRICS 37, 40 (2013); Saad B. Omer et al., *Geographic Clustering of Nonmedical Exemptions to School Immunization Requirements and Associations with Geographic Clustering of Pertussis*, 168 AM. J. EPIDEMIOLOGY 1389, 1389 (2008) [hereinafter Omer et al., *Geographic Clustering*].

32. Nina R. Blank et al., *Exempting Schoolchildren from Immunizations: States with Few Barriers Had Highest Rates of Nonmedical Exemptions*, 32 HEALTH AFFAIRS 1282, 1287 (2013); Omer et al., *Geographic Clustering*, *supra* note 31, at 1389; Stephanie Stadlin et al., *Medical Exemptions to School Immunization Requirements in the United States—Association of State Policies with Medical Exemption Rates (2004–2011)*, 206 J. INFECTIOUS DISEASES 989, 991 (2012).

33. See OFFIT, DEADLY CHOICES, *supra* note 11, at 140.

34. *Id.* at 141–45.

individual religious beliefs led to broader religious exemptions.<sup>35</sup> The breadth of current religious exemption laws in many states—and the limits on the ability of officials to investigate the validity of alleged religious beliefs opposing immunization—make religious exemptions especially vulnerable to abuse. While the Supreme Court found that “religious” can encompass “moral, ethical, or religious beliefs about what is right and wrong,” that are “held with the strength of traditional religious convictions,”<sup>36</sup> even that broad definition is not limitless: claiming a religious exemption when your reasons for not vaccinating are (often unfounded) safety concerns would be abusing the exemption.

This Article argues that such abuse does, indeed, occur, and probably frequently. Even if states value religious freedom, they may not be willing to allow religious exemptions if the majority of those taking advantage of them are refusing vaccines for reasons other than religion.

Demonstrating abuse is difficult, since people are naturally hesitant to openly admit that they are lying (although some people do). Hence, comparing the rates of those who have sincere religious beliefs that are in tension with vaccination with those who are using a religious exemption to mask other reasons is problematic. However, this Article draws on three types of evidence to support the claim that abuse is probably widespread. First, this Article examines existing studies and survey data about the reasons people do not vaccinate, highlighting that reasons given are generally not religious. Second, this Article demonstrates that mainstream religions support vaccination, or at least do not oppose or prohibit it. While our jurisprudence—correctly in my view—does not require that the exemptor’s religion oppose vaccination, when a given religion supports vaccination, we may plausibly suspect religious exemptions claimed by devoted practitioners of that religion to be for other reasons. Finally, the Article makes use of Facebook comments from public anti-vaccine pages on which members openly stated that they lied to obtain religious exemptions.

This Article proceeds in three parts. Part I describes the legal framework governing religious exemptions. Under U.S. jurisprudence, courts allow states to provide a religious exemption, but do not require it. At the same time, if a state does adopt a religious exemption, our jurisprudence makes it very difficult to prevent abuse. It does so by adopting positions that are reasonable; courts do not want to allow states to police beliefs. But the effect is to make it difficult, and in a number of states completely impossible, to refuse exemptions that officials believe are suspect. Part II marshals the evidence supporting the claim that many

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35. *See infra* Part I.B–C.

36. *Welsh v. United States*, 398 U.S. 333, 337–40 (1970) (discussing what religious means in the context of conscientious objectors to the draft).



people lie when they claim a religious exemption. Part III discusses three possible solutions, including tightening the requirements for religious exemptions. This is problematic, however, because tightening exemptions would require state officials to examine and assess the sincerity of individual beliefs, acting as conscience police. This Article favors one of the two other solutions, particularly the final one. A second solution would be removing all non-medical exemptions. This has the advantage of protecting the largest number of children. It has a cost, however: it is a very strong limitation of parental freedom. Additionally, it may trigger a backlash since people may resent what they would see as a more coercive policy. Further, it may lead more parents to homeschool, depriving their children of the benefits of public education. Finally, it may also encourage parents who are strongly opposed to vaccination to lie. The third option is a narrow, personal choice exemption that is difficult to obtain. This would allow those powerfully opposed to vaccines to exempt their children from vaccination and would still keep exemption rates low. It still, however, could be open to abuse and pretense, and it leaves more children vulnerable to preventable diseases, with their potential risks.

Experience suggests that the final two proposals would be politically difficult to pass. Both would face substantial vocal resistance from the anti-vaccine movement, which has substantial experience mobilizing to fight such laws. On the other hand, increased rates of disease outbreaks or increased consciousness of the harm caused by non-vaccination could generate the requisite political will. Furthermore, they are feasible, as highlighted in a recent study.<sup>37</sup>

### I. THE LAW ABOUT EXEMPTIONS

Beginning as early as the nineteenth century, states have required children to be immunized before attending public schools.<sup>38</sup> In 1922, the Supreme Court addressed the constitutionality of school immunization requirements.<sup>39</sup> Relying on its decision in *Jacobson v. Massachusetts*, which upheld mandatory immunization laws as a permissible use of the states' power to protect the public health,<sup>40</sup> the Supreme Court upheld the constitutionality of the vaccination requirement.<sup>41</sup> In the 1960s, data showed that states with school immunization requirements had substantially lower rates of measles than those without them.<sup>42</sup> As a

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37. Saad B. Omer et al., *Legislative Challenges to School Immunization Mandates, 2009–2012*, 311 JAMA 620, 621 (2014) [hereinafter Omer et al., *Legislative Challenges*].

38. *Duffield v. Sch. Dist. of Williamsport*, 29 A. 742 (Pa. 1894).

39. *Zucht v. King*, 260 U.S. 174, 176 (1922).

40. 197 U.S. 11, 25–27 (1905).

41. See *Zucht*, 260 U.S. 174.

42. Calandrillo, *supra* note 7, at 382.

result, in the 1970s, the federal government began providing incentives for states to enact such requirements.<sup>43</sup>

States did not create religious exemptions until the 1960s, and the movement began in New York.<sup>44</sup> Today, forty-eight states offer a religious exemption, a philosophical exemption, or both, in addition to a medical exemption.<sup>45</sup> Most recently, California passed Assembly Bill 2109, aimed at making it more difficult to qualify for the personal belief exemption. But in a signing statement, Governor Jerry Brown instructed the California Department of Health to add the religious exemption from the law's new requirements to the exemption forms—and such an exemption has, indeed, been added.<sup>46</sup>

The jurisprudence surrounding exemptions makes three things clear. First, states do not have to offer religious exemptions, but they may. Second, if they do offer them, states generally may not discriminate between religions—including between organized religions and personal beliefs. Finally, unless the state is very careful in drafting its exemption law, policing whether an exemptor has sincere religious beliefs can be tricky. The combination of these three factors makes religious exemptions a potentially bad deal for states because they can easily be abused, leading to high rates of exemptions by those whose reasons not to vaccinate are unrelated to their religious beliefs.<sup>47</sup> This Article argues that this is, indeed, what has happened.

#### A. RELIGIOUS EXEMPTIONS: A STATE PREROGATIVE

The Supreme Court last discussed the tension between religion and vaccines in obiter dictum in *Prince v. Massachusetts*.<sup>48</sup> After discussing the application of child labor laws to a religious minority—in that case Jehovah's Witnesses—the court discussed the tension between freedom of religion and general laws affecting child welfare.<sup>49</sup> Referencing cases that allowed states to mandate immunization,<sup>50</sup> the Court found that a

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43. *Id.* at 382–83.

44. JAMES COLGROVE, *STATE OF IMMUNITY: THE POLITICS OF VACCINATION IN TWENTIETH-CENTURY AMERICA 180–81* (2006).

45. Hope Lu, Note, *Giving Families Their Best Shot: A Law-Medicine Perspective on the Right to Religious Exemptions from Mandatory Vaccination*, 63 CASE W. RES. L. REV. 869, 885–86, 914–15 (2013).

46. Illegally, in my view. See Dorit Reiss, *Viewpoint: Signing Statement on Vaccines Is Not Law*, RECORDER (Oct. 9, 2013), <http://www.therecorder.com/id=1202622728667?slreturn=20140014230826>.

47. A state can decide to offer an exemption to people whose reasons are not actually religious, of course. One can argue that the personal belief exemptions adopted by some states fit into that category. But most states do not offer a personal belief exemption, and my impression is that for many of the states that do, the impetus was not to respect safety concerns as much as to respect a broader range of beliefs beyond what was traditionally considered “religion.” See Calandrillo, *supra* note 7, at 415–16.

48. *Prince v. Massachusetts*, 321 U.S. 158 (1944).

49. *Id.* at 165.

50. For example, the Court relied on *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), and *Zucht v. King*, 260 U.S. 174 (1922).

parent “cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death.”<sup>51</sup>

The basic tenet in *Prince* was upheld in subsequent cases.<sup>52</sup> No court—state or federal—has ever required a state to create a religious exemption. Several courts addressing this rejected such a claim. For example, in *Wright v. DeWitt School District*, the Supreme Court of Arkansas upheld a state law that contained only a medical exemption, finding that a state could infringe upon its citizens free exercise right for the good of the community.<sup>53</sup>

In one recent case, *Workman v. Mingo County Board of Education*, the Fourth Circuit relied on *Prince* and *Jacobson* in rejecting a challenge to West Virginia’s lack of a religious exemption. The court stated:

[T]he state’s wish to prevent the spread of communicable diseases clearly constitutes a compelling interest. In sum, following the reasoning of *Jacobson* and *Prince*, we conclude that the West Virginia statute requiring vaccinations as a condition of admission to school does not unconstitutionally infringe Workman’s right to free exercise. This conclusion is buttressed by the opinions of numerous federal and state courts that have reached similar conclusions in comparable cases.<sup>54</sup>

In fact, in several of the cases striking down religious exemption statutes, courts left the immunization requirements intact, following *Prince*’s logic, to protect children and the public health.<sup>55</sup> One court went even further. The Mississippi Supreme Court stated:

The exception, which would provide for the exemption of children of parents whose religious beliefs conflict with the immunization requirements, would discriminate against the great majority of children whose parents have no such religious convictions. To give it effect would result in a violation of the Fourteenth Amendment to the United States Constitution which provides that no state shall make any law denying to any person within its jurisdiction the equal protection of the laws, in that it would require the great body of school children to be vaccinated and at the same time expose them to the hazard of associating in school with children exempted under the religious exemption who had not been immunized as required by the statute.<sup>56</sup>

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51. *Prince*, 321 U.S. at 166–67.

52. See, e.g., *Brown v. Stone*, 378 So. 2d 218, 223 (Miss. 1979); *Boone v. Boozman*, 217 F. Supp. 2d 938, 946–51, 954 (E.D. Ark. 2002).

53. 385 S.W.2d 644, 648 (Ark. 1965). At the time, Arkansas had only a medical exemption but has since added religious and philosophical exemptions. See ARK. CODE ANN. § 6-18-702(d)(4)(A) (West 2014).

54. *Workman v. Mingo Cnty. Bd. of Educ.*, 419 F. App’x 348, 353–54 (4th Cir. 2011) (per curiam).

55. See, e.g., *Dalli v. Bd. of Educ.*, 267 N.E.2d 219, 222–23 (Mass. 1971); *Brown*, 378 So. 2d at 223, cert. denied, 449 U.S. 887 (1980).

56. *Brown*, 378 So. 2d at 223.

The *Brown v. Stone* court viewed the Fourteenth Amendment as preventing any religious exemption because such an exemption discriminates against children whose parents do not have religious beliefs opposed to vaccination. I would go the other way: while vaccinating does impose some burden—you need to go to the doctor, get the vaccine, and face the risk of one of the rare side effects—it seems that the discrimination is more against the children left unprotected against disease because of their parents' beliefs. And, it is not exactly discrimination to force children to associate with the exempt children. But the idea of reading religious exemptions as a violation of equal protection is tempting, and has been repeated in several places. For example, Alicia Novak has made a strong case against religious exemptions in the name of children's rights.<sup>57</sup>

This view is also appealing to at least one vaccine expert, Dr. Paul Offit, who thinks it is a desirable interpretation for policy reasons.<sup>58</sup> Specifically, Dr. Offit believes that leaving children unprotected against preventable diseases because their parents hold religious views is inappropriate.<sup>59</sup> He seems to interpret this in a straightforward manner: he believes that leaving children exposed to preventable diseases because of their parents' religious beliefs amounts to discrimination.<sup>60</sup>

Using *Brown* to ground a federal rule against exemption, however, poses a number of problems. First, *Brown* is weak precedent for this conclusion. No other court has adopted its reasoning, so it stands as somewhat of an outlier. In addition, the *Brown* reasoning was not well developed and focuses on the discrimination against vaccinated children that results from the existence of the exemptions. I think an interpretation that sees discrimination against the children left exposed makes more sense, but it is difficult to ground such an interpretation in *Brown*, given the (somewhat unclear) language the court used. To make the case for interpreting the Constitution to prohibit exemptions, one would have to make the legal argument better than the court and think through some difficult questions: What is the justification of seeing this as discrimination, rather than a real distinction? How does this interpretation of the Fourteenth Amendment relate to parental rights and freedom of religion? How does it square with other Supreme Court decisions?

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57. Alicia Novak, Note, *The Religious and Philosophical Exemptions to State-Compelled Vaccination: Constitutional and Other Challenges*, 7 U. PA. J. CONST. L. 1101, 1115–16 (2005). See *infra* notes 58–69 for a discussion of other constitutional objections.

58. Dr. Paul Offit expressed that view in his lectures in a course about vaccines. See Paul A. Offit, 'Vaccine Exemptions'? Call Them What They Really Are, MEDSCAPE (Aug. 10, 2012), <http://www.medscape.com/viewarticle/768746>.

59. *Id.* See *infra* Part III.B.

60. Offit, *supra* note 58.

In her article, Novak offers a number of other reasons the religious exemption might be unconstitutional. Under the Establishment Clause, she cites the argument that religious exemption statutes improperly advance religion.<sup>61</sup> She also cites the *Lemon v. Kurtzman* test,<sup>62</sup> which requires that there be a secular purpose for the act, that the main effect of the act neither advances nor inhibits religion, and that the statute does not result in extensive entanglement between government and religion.<sup>63</sup> The *Lemon* test has never been interpreted to bar religious exemptions completely, but Novak makes a strong argument that exemptions requiring membership in an organized religion fail the second and third prongs (*Sherr v. Northport-East Northport Union Free School District* supports this proposition<sup>64</sup>), and that laws requiring a showing of sincerity violate the third prong because they require close scrutiny of an individual's religious beliefs.<sup>65</sup> Novak suggests that simple form submission—signing a form that says that your opposition stems from your religious beliefs—is most likely to withstand the *Lemon* test.<sup>66</sup> While only the first type of exemption—the organized religion exemption—has been struck down so far, Novak has a point about the second type.<sup>67</sup> As she suggests, making the form exemption the only constitutionally permissible form of religious exemption would make the exemption even more vulnerable to abuse.

The United States values freedom of religion. Some of the early immigrants were religious minorities. Separation of church and state is embedded in the First Amendment,<sup>68</sup> and the United States regularly scores high on religiosity measures.<sup>69</sup> Therefore, there is a case to be made for respecting and protecting freedom of religion, at least to the extent of allowing states to provide some autonomy to religious minorities. It is not clear that any other court in the United States will be willing to go as far as the *Brown* court and actually forbid a state from having religious exemptions.

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61. Novak, *supra* note 57, at 1111.

62. See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

63. *Id.* at 612–13.

64. *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 89 (E.D.N.Y. 1987).

65. Novak, *supra* note 57, at 1111–14.

66. *Id.* at 1114–15.

67. For a further discussion of the second option, see *infra* Part III.

68. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .”).

69. PEW RESEARCH CENTER, PEW FORUM ON RELIGION & PUB. LIFE, “NONES” ON THE RISE: ONE-IN-FIVE ADULTS HAVE NO RELIGIOUS AFFILIATION 14, 16–17 (2012) (the number of Americans who say religion is important in their lives is 58% as compared to Britain at 17% France at 13% Germany at 21% and Spain at 22%); KENNETH D. WALD & ALLISON CALHOUN-BROWN, RELIGION AND POLITICS IN THE UNITED STATES 11–16 (2007).

The jurisprudence on the level of protection given to religious practices in the face of general laws is somewhat confusing. On the one hand, in 1972, the Supreme Court struck down the convictions of Amish parents who refused to send their children to school past eighth grade, emphasizing the importance of parents' freedom to control the religious upbringing of their children.<sup>70</sup> On the other hand, in 1990, the Court upheld the deprivation of unemployment benefits from Native Americans using peyote in religious rituals, ruling that it is constitutional to apply general laws to religious minorities.<sup>71</sup> Although *Employment Division v. Smith* did not explicitly overrule *Wisconsin v. Yoder*, the relationship between the two remains uncertain. Hope Lu interprets *Yoder* as applying to a subcategory of situations in which multiple constitutional rights intersect, a "religious freedom plus" approach.<sup>72</sup> Lu would include limited protection of the freedom not to vaccinate in that category. But that seems problematic; as mentioned, *Yoder* itself carved out an exemption by saying that states have "undoubted" power to promote "health, safety, and the general welfare."<sup>73</sup> Further, as pointed out by Shawn Francis Peters,<sup>74</sup> the Court was careful to craft the opinion so narrowly that it is difficult to apply it to any facts other than those matching *Yoder*.

In another set of cases, the Court struck down congressional attempts to legislate a general higher standard of review for laws imposing burdens on religious minorities.<sup>75</sup> Later, however, the Court upheld a statute imposing such a standard in relation to limits on the practice of religious freedom by prisoners.<sup>76</sup> In *Burwell v. Hobby Lobby*, the Supreme Court recently reaffirmed the application of *Smith*.<sup>77</sup> Both the majority and the dissent agreed that enforcing a generally applicable law against those with religious objections to that law does not violate the First Amendment.<sup>78</sup>

The best conclusion is that, at present, the exemption jurisprudence is enabling, not mandating; it allows states to adopt a religious exemption, but does not require it. In choosing this approach, the courts seem to be deferring to the legislature's balancing of many factors: freedom of religion, especially that of religious minorities; parental

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70. *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972). In *Yoder*, however, the Court explicitly stated that the state may regulate health and welfare, even if it means restricting religion. *Id.* at 230.

71. *Emp't Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872, 890 (1990).

72. Lu, *supra* note 45 at 882–83.

73. *Yoder*, 406 U.S. at 220.

74. SHAWN FRANCIS PETERS, THE YODER CASE: RELIGIOUS FREEDOM, EDUCATION, AND PARENTAL RIGHTS 153–54 (2003).

75. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).

76. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005).

77. Nos. 13-354 & 13-356, 2014 WL 292179, at \*7 (U.S. June 30, 2014).

78. *Id.* at \*32–33 (Ginsburg, J., dissenting).

power to make medical decisions for their children; the interests of the child to be free of vaccine-preventable disease (since, despite the insistence of anti-vaccine activists, it is very, very clear that for every vaccine provided, the risks of vaccinating are outweighed by the risk of not vaccinating, by an order of magnitude);<sup>79</sup> and the interest of the community in preventing outbreaks.<sup>80</sup> The tension between religious values and the risk of outbreaks is especially interesting in this context because the legislature's willingness to allow religious exemptions probably depends, at least in part, on a legislative assessment of whether this would increase the risk of outbreaks.

The initial New York exemption seems to have been adopted with Christian Scientists in mind.<sup>81</sup> I have not examined every state, but the fact that quite a few states initially limited the exemption to organized religions opposed to vaccination (an approach rejected by most courts) suggests that they had small groups of religious minorities in mind and were not trying to accommodate those driven by fears about the safety of vaccines. If that was indeed the goal, the jurisprudence surrounding exemptions, which limits the ability of states to narrowly accommodate religious minorities, combined with evidence that some people take advantage of the religious exemptions, may, and probably should, lead legislatures to reexamine and reconsider whether these exemptions are appropriate.

As the number of exemptors grows, so does the risk of outbreaks.<sup>82</sup> Legislatures willing to provide an exemption to small, unique religious sects, assuming those sects are small enough that herd immunity would not be compromised if their members were not vaccinated, may have been less willing to grant that exemption if they knew they would not be allowed to limit it. Of course, once the exemption is in place, it creates its own constituency and may be politically more difficult to remove.<sup>83</sup> But more difficult to remove is not impossible.

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79. See THE AUSTRALIAN IMMUNISATION HANDBOOK, *supra* note 18; *Risk from Disease Versus Risk from Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 18, 2011), <http://www.cdc.gov/vaccines/vac-gen/6mishome.htm#risk> [hereinafter CDC, *RISK FROM DISEASE*].

80. For a similar discussion of the set of interests involved, see Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions to Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 278 (2003).

81. COLGROVE, *supra* note 44, at 12.

82. See Omer et al., *Geographic Clustering*, *supra* note 31, at 1394-95; Saad B. Omer et al., *Nonmedical Exemptions to School Immunization Requirements: Secular Trends and Association of State Policies with Pertussis Incidence*, 296 JAMA 1757, 1758 (2006).

83. For a similar problem in other contexts, see Paul Sabatier, *Social Movements and Regulatory Agencies: Toward a More Adequate—and Less Pessimistic—Theory of “Clientele Capture”*, 6 POL’Y SCIS. 301, 303-05 (1975). Diffuse majorities may not be able to make changes when those changes are opposed by concentrated minorities that benefit from them.

For the risk of outbreaks, the basic insight is that the decision not to vaccinate does not affect the unvaccinated child alone. It is not that the rights of the unvaccinated child are unimportant; the argument regarding parental choice is simply stronger in relation to that child than it is in relation to the rest of the community. A parent has more freedom when her choices only affect her child than when her choices affect others.<sup>84</sup> While no vaccine is perfect, most childhood vaccines, with the exception of the influenza vaccine, provide very high rates of effectiveness, in the seventy to ninety-nine percent range.<sup>85</sup> Further, research has consistently shown that unvaccinated children contract vaccine-preventable diseases at higher rates than vaccinated children, although not necessarily in higher absolute numbers.<sup>86</sup> The unvaccinated child also has a higher risk of transmitting the disease. The child may transmit the disease to those unimmunized (because they are too young, because they have medical conditions that are contraindications to vaccination, or for other reasons). She may also transmit the disease to the small number of children suffering from vaccine failure. Measles outbreaks in unvaccinated communities also demonstrate how non-vaccination can have impacts beyond the family.<sup>87</sup>

This is not a merely theoretical possibility. In 2008, an unvaccinated child in San Diego caught measles and infected others, which caused several children to fall ill and an infant too young to vaccinate to be hospitalized.<sup>88</sup> An even more tragic case occurred in Germany.<sup>89</sup> An

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84. Calandrillo, *supra* note 7, at 395, 428; Alexandra M. Stewart, Commentary, *Challenging Personal Belief Immunization Exemptions: Considering Legal Responses*, 107 MICH. L. REV. FIRST IMPRESSIONS 105, 105 (2009).

85. CDC, *Risk from Disease*, *supra* note 79.

86. Feikin et al., *supra* note 30, at 3147; Jason M. Glanz et al., *Parental Refusal of Pertussis Vaccination Is Associated with an Increased Risk of Pertussis Infection in Children*, 123 PEDIATRICS 1446, 1449 (2009); Stephen P. Teret & Jon S. Vernick, Commentary, *Gambling with the Health of Others*, 107 MICH. L. REV. FIRST IMPRESSIONS 110, 110–113 (2009). To illustrate this, imagine a population of 1000 children, maybe in a school, 950 (or ninety-five percent) of whom are vaccinated against measles and fifty (or five percent) of whom are not vaccinated. In a measles outbreak, fifty percent of the unvaccinated children contract measles—twenty-five children. Five percent of the vaccinated children contract it, or forty-eight children (rounding up). More vaccinated children caught the disease, but the child would be less likely to contract measles if she were vaccinated than if she were not. Additionally, the rates would be much higher among the unvaccinated.

87. See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, *Notes from the Field: Measles Outbreak Among Members of a Religious Community—Brooklyn, New York*, 62 MORBIDITY & MORTALITY WKLY. REP. 752 (2013); CTRS. FOR DISEASE CONTROL & PREVENTION, *Notes from the Field: Measles Outbreak Associated with a Traveler Returning from India—North Carolina, April–May 2013*, 62 MORBIDITY & MORTALITY WKLY. REP. 753. These communities may have sincere religious opposition to vaccination; they are, however, mentioned as an example of the danger of concentrating unvaccinated individuals in one area.

88. David E. Sugerman et al., *Measles Outbreak in a Highly Vaccinated Population, San Diego, 2008: Role of the Intentionally Undervaccinated*, 125 PEDIATRICS 747, 747–48 (2010).

89. *Medical Care for Unvaccinated Children*, JUST THE VAX (Apr. 23, 2009), <http://justthevax.blogspot.com/2009/04/medical-care-for-unvaccinated-children.html>.



eleven-year-old child left unvaccinated by parental choice was taken to the pediatrician.<sup>90</sup> The child had measles and infected six others in the doctor's office, including three babies too young to vaccinate.<sup>91</sup> Two of the children he infected contracted a rare but horrendous complication of measles called subacute sclerosing panencephalitis ("SSPE").<sup>92</sup> SSPE usually appears years after the measles victim apparently recovers. It causes victims to deteriorate slowly, first losing cognitive and motor ability, and then becoming unable to talk, walk, or eat unassisted before they eventually slip into a coma and die.<sup>93</sup> There is no cure, although treatment may slow down the deterioration and death.<sup>94</sup> This was the fate of young Natalie<sup>95</sup> and Micha,<sup>96</sup> who contracted it as babies. For years, their families watched their children's slow decline, knowing there was no hope. Then, the children died.

We are lucky that vaccination rates have been reasonably high for a long time. Most vaccine-preventable diseases—or at least the scariest of them—are now rare. A ring of vaccinated individuals makes it more difficult for the diseases to reach the non-immune. Thus, the chances of an unvaccinated child contracting such a disease, while substantially higher than those of a vaccinated child, are not dramatically high, and the chances of transmitting the disease are also low. But that reality is dependent on continuing the high rates of vaccination; if exemption rates increase, that may change.

To some degree, that is already happening. The most contagious diseases come back first. The United States has seen a reemergence of measles, an unusually contagious disease, after a period in which cases averaged around sixty per year.<sup>97</sup> While the number of cases is nowhere near the four million annual cases during the pre-vaccine era<sup>98</sup>—222 in 2011,<sup>99</sup> 159 by late August 2013,<sup>100</sup> and 566 cases as of July 2014<sup>101</sup>—the

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90. *Id.*

91. *Id.*

92. *Subacute Sclerosing Panencephalitis*, PUBMED HEALTH (Aug. 1, 2012), <http://www.ncbi.nlm.nih.gov/pubmedhealth/PMH0002392>.

93. *Id.*

94. *Id.*

95. *So Predictable—So Sad, Natalie Dies of SSPE*, JUST THE VAX (Oct. 20, 2011), <http://justthevax.blogspot.co.uk/2011/10/so-predictable-so-sad-natalie-dies-of.html>. The video in the post shows the suffering Natalie and her family went through with the SSPE (the video is in German).

96. *Micha is Dead*, JUST THE VAX (June 13, 2013), <http://justthevax.blogspot.co.uk/2013/06/micha-is-dead.html>.

97. CTRS. FOR DISEASE CONTROL & PREVENTION, *Measles—United States, 2011*, 61 MORBIDITY & MORTALITY WKLY. REP. 253 (2012) [hereinafter CDC, *Measles 2011*].

98. Roush & Murphy, *supra* note 8, at 2156.

99. CDC, *Measles 2011*, *supra* note 97.

100. *Measles Outbreaks*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/measles/outbreaks.html> (last visited Aug. 1, 2014). The numbers were lower for 2012. *Id.*

101. *Id.*

increase is concerning.<sup>102</sup> And measles is just the most contagious; nobody wants rates of diphtheria, HiB, or rubella to soar or for polio to reappear in the United States. But if rates of vaccination drop low enough, that might happen. The increase in outbreaks may be one reason that several states are currently reexamining their exemption laws, and others have tightened them.<sup>103</sup>

The balancing of these interests by the states is complicated by the way the courts have interpreted existing exemption laws and the constitutional limitations.

#### B. EQUAL PROTECTION AND RELIGIOUS BELIEFS

Initial exemption laws often created exceptions for those belonging to an organized religion that prohibited vaccination.<sup>104</sup> This suggests that the legislatures had Christian Scientists and similar religions in mind, rather than an exemption that would cover anyone claiming a religious objection. But from an early stage, plaintiffs requesting exemptions challenged the limitation to organized religions, claiming that other types of religious beliefs should also be covered. The first claims were dismissed when the courts found that the real reason behind plaintiffs' opposition to vaccination was not religion but safety concerns.<sup>105</sup>

But in 1971, the Supreme Judicial Court of Massachusetts addressed the constitutionality of a statute limiting exemption to "members of 'a recognized church or religious denomination'"<sup>106</sup> when the plaintiff's opposition to vaccines stemmed from sincere religious beliefs that were not endorsed by any organized religion. The court found that the only inquiry it could make was whether the beliefs were sincerely held. "If the beliefs be sincerely held they are entitled to the same protection as those more widely held by others."<sup>107</sup> The court held that:

It is clear that the third paragraph of [the governing statute] extends preferred treatment to adherents and members "of a recognized

102. This Article does not address the increase in pertussis cases because, while the unvaccinated are more at risk of pertussis, that is not the only, or even the main reason we see outbreaks. *See generally* Glanz et al., *supra* note 86, at 1447–50. While pockets of exemptions are at higher risks of outbreaks, the main reason for the increase seems to be a pertussis vaccine that is not as effective as scientists expected, with reasonable short-term immunity but quickly waning long-term immunity. Omer et al., *Geographic Clustering*, *supra* note 31, at 1390–94; Imdad et al., *supra* note 31, at 40.

103. Omer et al., *Legislative Challenges*, *supra* note 37, at 620–21.

104. COLGROVE, *supra* note 44, at 182.

105. *See, e.g., In re Elwell*, 284 N.Y.S.2d 924, 932 (N.Y. Fam. Ct. 1967) (noting the objection was not because of religion but because of "personal opinions, fears unsupported by any competent medical proof, and a purported exercise of their own consciences which would not interfere with their free exercise of the tenets of the Methodist Church"); *see also* McCartney v. Austin, 293 N.Y.S.2d 188, 199 (N.Y. App. Div. 1968) (finding that the plaintiff's beliefs were actually based on a "personal moral code or philosophy not based on or by reason of religious training, belief or conviction").

106. *Dalli v. Bd. of Educ.*, 267 N.E.2d 219, 220 (Mass. 1971).

107. *Id.* at 222.

church or religious denomination” who object to vaccination on religious grounds. They enjoy the benefit of an exemption which is denied to other persons whose objections to vaccination are also grounded in religious belief. This preferred treatment of one group and discrimination against the other violates the First and Fourteenth Amendments of the United States Constitution, as well as art. 2 of the Declaration of Rights of the Massachusetts Constitution. . . . A majority of the court hold [sic] therefore that the third paragraph of [the governing statute] is unconstitutional and must be stricken.<sup>108</sup>

The court struck down the exemption clause as discriminatory. It then upheld the immunization requirement as constitutional without an exemption, requiring that the plaintiff comply and immunize her daughter if she wanted her to attend school—no doubt to the chagrin of the plaintiff.<sup>109</sup>

Cases in other states mostly followed the same approach:<sup>110</sup> if a state wanted to offer a religious exemption it could not limit the exemption to organized religions because that discriminated in favor of certain religious beliefs and against others. The one exception was Kentucky. There, a federal district court upheld as constitutional a statute that only exempted from vaccination “members of a nationally recognized and established church or religious denomination, the teachings of which are opposed to medical immunization against disease.”<sup>111</sup> However, shortly after the decision, the legislature amended the statute to remove that qualification, establishing a broad religious exemption,<sup>112</sup> and it is unclear whether the decision would have been upheld once other courts found otherwise. The current jurisprudence, therefore, requires that if a state wants to provide a religious exemption, it must provide the exemption to anyone with a sincere religious belief opposed to vaccination.

### C. POLICING RELIGIOUS EXEMPTIONS: A REAL CHALLENGE

The choice to allow exemptions for members of organized religions opposed to vaccination is understandable. While this method does discriminate against those who are not members but still have a sincere belief, it is also relatively easy to verify both an established religion’s position—it will probably be public—and membership. This method is not foolproof, however; religions have been created for the purpose of

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108. *Id.* at 223.

109. *Id.*

110. *See, e.g.,* *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 87–88 (E.D.N.Y. 1987); *Bowden v. Iona Grammar Sch.*, 726 N.Y.S.2d 685, 686–87 (N.Y. App. Div. 2001); *In re LePage*, 18 P.3d 1177, 1180 (Wyo. 2001).

111. *Kleid v. Bd. of Educ. of Fulton*, 406 F. Supp. 902, 904 (W.D. Ky. 1976) (citing and quoting KY. REV. STAT. ANN. § 214.036 as enacted at the time).

112. KY. REV. STAT. ANN. § 214.036 (2014).

providing exemptions. For example, members of the Congregation of Universal Wisdom,<sup>113</sup> created by a chiropractor, are “primarily parents who are seeking exemptions to vaccination requirements.”<sup>114</sup> Part II.D.2 provides additional examples of spurious religions and people joining a religion simply to claim an exemption. Although requiring membership in an organized religion could be exploited, it is much easier to confirm beliefs of such religions than it is to ensure the sincerity of those requesting an exemption due to personal proclivities.

Courts’ reluctance to police religious beliefs is even more understandable. There is something immensely troubling about a state determining which religious beliefs are valid and which are not. The First Amendment was created to prevent the state from making such determinations. Freedom of conscience and religion means that the state may not tell me if my beliefs are legitimate. Bluntly put, it is none of the state’s business what I believe, and it does not get to tell me that my beliefs are not worthy.

But the concern about a state judging religious beliefs and determining which are legitimate is in tension with the ability of a state’s executive to limit the religious exemption to those truly acting for religious reasons. It is difficult to draw the line between evaluating the worth of a belief and evaluating its sincerity, and courts were understandably careful. That said, if a health department is to limit the religious exemption to beliefs actually opposed to vaccination, it needs tools to do so. Current jurisprudence does not offer adequate tools. Removing the ability to limit the exemption to organized religion is one example of this tension between religious freedom and enforcement.

As discussed below, most religions either fail to prohibit vaccinations or explicitly support them. This would, naturally, raise the suspicion that a member of such a religion who is opposing vaccination on religious grounds is lying. But several cases rejected this common sense interpretation<sup>115</sup> due to these courts’ unwillingness to allow state administrations to determine what is legitimate for a member of a religion to believe. This is another manifestation of courts’ disinclination to allow states to determine which beliefs are legitimate. But by taking this approach, courts are depriving state administrations of another way to assess sincerity.

For example, in *Berg v. Glen Cove*,<sup>116</sup> the court upheld an exemption request by Jewish parents, although most theologians agree

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113. CONGREGATION OF UNIVERSAL WISDOM, <http://www.cuwisdom.org> (last visited Aug. 1, 2014).

114. Calandrillo, *supra* note 7, at 357.

115. *See infra* notes 116–19.

116. *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651 (E.D.N.Y. 1994); *cf. McCartney v. Austin*, 293 N.Y.S.2d 188, 200 (N.Y. App. Div. 1968) (denying exemption to Roman Catholic parents because the religion did not oppose immunization).

that Judaism favors immunization. One rabbi submitted an opinion to the effect that “there is nothing in the teachings of the Jewish religion that would proscribe immunization for children.”<sup>117</sup> The court accepted the parents’ own idea of Judaism, and because it saw their claims as sincere, upheld their request for an exemption.<sup>118</sup> Another New York court reached a similar result in *Matter of Shmuel G. v. Rivka G.*<sup>119</sup>

I have not seen any similar cases in other jurisdictions. New York’s religious exemption is known as one of the most difficult to attain, and New York is one of the few states that requires a showing of sincere religious belief.<sup>120</sup> Quite a few other states do not require such a showing. If a state statute does not require a showing of sincerity, courts have ruled that administrative agencies may not demand proof of sincerity.<sup>121</sup> Again, this makes enforcing the statute difficult.

In short, in many states, officials face real challenges in limiting the religious exemption to people whose reasons for not vaccinating are truly religious. In quite a few states, this is impossible to do if officials may not inquire into sincerity. The courts’ reluctance to allow government to police religious beliefs leaves health departments with very limited tools to police the exemptions and prevent abuse.

## II. IT IS NOT USUALLY ABOUT RELIGION

The problems of enforcing religious exemptions are especially serious, since there are multiple indications that the majority of parents who take an exemption do not do so for religious reasons. This Part uses three types of evidence to support the argument: (1) what we know about the reasons given by those who do not vaccinate from studies, buttressed with a small number of examples from cases; (2) what religions actually say about vaccines; and (3) what some non-vaccinating parents tell their social networks.

### A. REASONS FOR NOT VACCINATING: THE LITERATURE

Studies examining why parents do not vaccinate—as well as studies looking at Internet content on anti-vaccine sites—highlight a number of safety concerns and mistrust of the government, doctors, pharmaceutical

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117. *Berg*, 853 F. Supp. at 655. For a discussion of Judaism and immunization, see *infra* Part II.B.

118. *Berg*, 853 F. Supp. at 655.

119. 800 N.Y.S.2d 357 (N.Y. Fam. Ct. 2005).

120. Other such states include North Carolina and Maryland. See ALAN G. PHILLIPS, THE AUTHORITATIVE GUIDE TO VACCINE LEGAL EXEMPTIONS 41, 50 (2013).

121. *In re LePage*, 18 P.3d 1177, 1180 (Wyo. 2001) (“[T]he statutory language lacks any mention of an inquiry by the state into the sincerity of religious beliefs. As a result, the Department of Health exceeded its legislative authority when it conducted a further inquiry into the sincerity of Mrs. LePage’s religious beliefs.”). For a detailed analysis of this, see Silverman, *supra* note 80, at 289–92; see also *Dep’t of Health v. Curry*, 722 So. 2d 874, 878–79 (Fla. Dist. Ct. App. 1998).

companies, or all of the above—but not religious concerns. Safety concerns figure prominently.<sup>122</sup> Non-vaccinating parents also doubt the effectiveness of vaccines and see vaccine-preventable diseases as “mild.”<sup>123</sup> They mistrust health professionals and government sources.<sup>124</sup> A recent survey of those taking advantage of exemptions in New Mexico demonstrated that their main concerns were not religion-based; however, the state provides only a religious or a medical exemption, so these parents must have used one or the other to obtain the exemption.<sup>125</sup>

In his article, Dr. John Grabenstein points out that even among religious communities, concerns about vaccines are often based on safety or social concerns rather than theology.<sup>126</sup> Similar themes can be seen on anti-vaccination websites.<sup>127</sup>

A closer examination of two claims for religious exemptions can provide a fuller picture of how this works. In Mary Check’s story, publicized on the Internet through a fundraising site created by her mother, Dina Check,<sup>128</sup> and a petition Dina created through Change.org,<sup>129</sup> Dina talks about Mary crying and inconsolable after being vaccinated. Dina suggests that a variety of Mary’s health problems are related to vaccines.<sup>130</sup> Dina applied for a medical exemption, but, unsure that she would get it, also applied for a religious exception. She emphasizes her strong religious conviction and appeal to God. Without

122. Allison Kennedy et al., *Vaccine Attitudes, Concerns, and Information Sources Reported by Parents of Young Children: Results from the 2009 HealthStyles Survey*, 127 PEDIATRICS S92, S95 (2011) [hereinafter Kennedy et al., *Vaccine Attitudes*]; Allison M. Kennedy et al., *Vaccine Beliefs of Parents Who Oppose Compulsory Vaccination*, 120 PUB. HEALTH REPS. 252, 252, 256 (2005) [hereinafter Kennedy et al., *Vaccine Beliefs of Parents*]; Katrina F. Brown et al., *Factors Underlying Parental Decisions About Combination Childhood Vaccinations Including MMR: A Systematic Review*, 28 VACCINE 4235, 4243 (2010).

123. Brown et al., *supra* note 122, at 4243; Kennedy et al., *Vaccine Attitudes*, *supra* note 122, at S95; Kennedy et al., *Vaccine Beliefs of Parents*, *supra* note 122, at 255.

124. Brown et al., *supra* note 122, at 4243; see E. Allison Hagood & Stacy Mintzer Herlihy, *Addressing Heterogeneous Parental Concerns About Vaccination With a Multiple-Source Model: A Parent and Educator Perspective*, 9 HUMAN VACCINES & IMMUNOTHERAPEUTICS 1790, 1791 (2013).

125. N.M. DEP’T OF HEALTH, *supra* note 2.

126. John D. Grabenstein, *What the World’s Religions Teach, Applied to Vaccines and Immune Globulins*, 31 VACCINE 2011, 2019 (2013).

127. See generally Richard K. Zimmerman et al., *Vaccine Criticism on the World Wide Web*, 7 J. MED. INTERNET RESEARCH e17 (2005); Anna Kata, *A Postmodern Pandora’s Box: Anti-Vaccination Misinformation on the Internet*, 28 VACCINE 1709, 1711–12 (2010) (also mentions moral reasons, but they figure alongside the other reasons).

128. *Meet Mary*, SUPPORT MARY’S RIGHTS, <http://www.supportmarysrights.com/meet-mary.html> (last visited Aug. 1, 2014).

129. *The Legislature of the State of New York: Change the Law in NYS Allowing for Exemptions to Vaccines for Any Reasons*, CHANGE.ORG, <http://www.change.org/petitions/the-legislature-of-the-state-of-new-york-change-the-law-in-nys-allowing-for-exemptions-to-vaccines-for-any-reasons-2> (last visited Aug. 1, 2014).

130. *Letter to the Public*, SUPPORT MARY’S RIGHTS, <http://www.supportmarysrights.com/letter-to-the-public.html> (last visited Aug. 1, 2014).

doubting her sincerity, it is fairly clear that her reasons for not wanting to vaccinate Mary are that she believes vaccines have harmed and will harm Mary. That is what the court examining the issue concluded.<sup>131</sup>

Dina Check provided the following explanation of the religious aspect of her decision:

I am requesting this religious exemption because it is my strong belief that all vaccines are made with toxic chemicals that are injected into the bloodstream by vaccination. According to the FDA all vaccines are made with foreign proteins (viruses & bacteria's), and some vaccines are even made with genetically engineered viral and bacterial materials. . . . I believe that man is made in God's image and the injection of toxic chemicals and foreign proteins into the bloodstream is a violation of God's directive to keep the body, (which is to be treated as a temple), holy and free from impurities . . .<sup>132</sup>

This reflects common arguments made by anti-vaccination activists and is, as is common among such groups, inaccurate in several ways: vaccines are not injected into the blood stream, the substances in them are found in nature, and the amounts of ingredients are too small to be toxic.<sup>133</sup>

On how she developed her views on vaccination, Dina explained:

Q: When did you adopt your religious views on vaccination?

A: When my daughter was an infant.

Q: Was there something that occurred that prompted—

A: Well, first of all, dealing with her situation, I—it did. I should say, yes. Because dealing with her as a child, having her be so delicate to everything that we did or g[ave] her as far as formula, food, anything she would have a reaction to . . . . After she had her first shot, she had chronic diarrhea, vomiting, screaming uncontrollably . . . . I was sick. I knew I—I had a very bad feeling then, but I was not sure. I then would go and reach for God and ask [H]im for the answers and what am I doing, am I doing the proper thing. I was reaching for [H]is guidance.<sup>134</sup>

The court quoted Dina as saying:

Plaintiff testified that she believes vaccinations pose a threat to her daughter's physical safety, saying that any immunization "could hurt my daughter. It could kill her. It could put her in anaphylactic shock. It could cause any number of things." She also doubts that vaccines are effective . . . .<sup>135</sup>

Unsurprisingly, the court rejected Dina's claim that her opposition to vaccines was based on her religious beliefs. The court concluded that:

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131. Check *ex rel.* MC v. New York City Dep't of Educ., No. 13-cv-791, 2013 WL 2181045, at \*11 (E.D.N.Y. May 20, 2013).

132. *Id.* at \*6.

133. Paul A. Offit & Rita K. Jew, *Addressing Parents' Concerns: Do Vaccines Contain Harmful Preservatives, Adjuvants, Additives or Residuals?*, 112 PEDIATRICS 1394, 1399 (2003).

134. Check *ex rel.* MC, 2013 WL 2181045, at \*7.

135. *Id.* at \*8 (citations omitted).

[I]n light of Plaintiff's medical concerns, her refusal to vaccinate her child is based on her belief that vaccines can, and indeed have, caused harm to her child. As succinctly stated in the R & R, "Plaintiff's resolve to protect her child does not constitute a religious belief."<sup>136</sup>

Furthermore, the court stated that:

[I]n light of Plaintiff's extensive testimony emphasizing the malignant effects that she believes past vaccinations have had on her daughter, the harmful composition of the vaccinations, and her belief that further vaccinations would physically endanger her daughter, the court concludes only that Plaintiff's aversion to immunization is here based on her conviction that vaccines pose a severe medical risk to her child's welfare. The court in no way means to diminish or minimize Plaintiff's fear of immunization. That fear, however, is not a proper basis for a religious exemption.<sup>137</sup>

I do not know whether Dina has a valid medical claim, and it is not relevant for the purpose of this analysis. The court was correct to say that Dina's reasons for not wanting to vaccinate were primarily health concerns, not religious reasons. Her deep religious convictions may strengthen her resolve to get her unvaccinated daughter into public schools, but they are not at the heart of her opposition to vaccination.

In *Farina v. Board of Education*,<sup>138</sup> Mr. and Mrs. Farina submitted forms obtained from the Internet to support their request for a religious exemption. Here, too, the court highlighted that the main issue was not religion: "Mrs. Farina's repeated statements that her older son, who had been immunized before the age of eight months, 'regressed in speech and behavior' during the summer of 1997 raises the likelihood that the Farinas' concerns are for their child's physical rather than his spiritual health."<sup>139</sup>

While there may be small pockets of people who oppose vaccination on religious grounds, sources examining the reasons for not vaccinating suggest that the more common reasons given are not religious, but generally ill-founded safety concerns.

#### B. MAJOR RELIGIONS THAT SUPPORT VACCINATIONS

While courts in the United States interpret religion broadly, focusing not on organized religion but on the existence of a personal religious belief, the positions of organized religion can be instructive in assessing the credibility of claims of religious objections. Simply put, if a person's religion does not object to—or even supports—vaccination, her claim to a religious objection can be regarded somewhat suspiciously. This Subpart demonstrates that some small, radical sects aside, no major

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<sup>136</sup>. *Id.* at \*2.

<sup>137</sup>. *Id.* at \*3.

<sup>138</sup>. 116 F. Supp. 2d 503 (S.D.N.Y. 2000).

<sup>139</sup>. *Id.* at 510–11.



religion actually prohibits vaccines, and several religions actively recommend, and according to some, require that parents vaccinate their children against preventable diseases. Where religious scholars speak against vaccines, it is often based on safety concerns, not religion. Where scholars object on religious grounds, they do not prohibit vaccination, but merely offer permission to avoid it.<sup>140</sup>

### I. Judaism

Starting with my own religion, while there is no one authoritative voice in Judaism, all scholarly opinions I reviewed concluded that Judaism either strongly recommends vaccines or, in the extreme case, requires them. According to Rabbi Yitzchak Breitowitz from Yeshivas Ohr Somayach, two religious principles explain Judaism's approach to vaccination.<sup>141</sup> First, a Jew is prohibited from placing her health or life in unreasonable danger, because her life is not her own, it belongs to God.<sup>142</sup> Second, a Jew is required not to expose others to danger, and in fact, to take positive steps to rescue others from peril.<sup>143</sup> From these principles, the Rabbi points to two possible approaches. According to Rabbi Shlomo Zalman Auerbach, as long as there is a ninety percent or higher compliance with vaccination—providing herd immunity protection to the unvaccinated child and the larger community—parents would not have a halachic obligation<sup>144</sup> to vaccinate, although vaccinating is highly desirable and recommended (Rabbi Auerbach might support excluding unvaccinated children from school because of the risk they pose to others).<sup>145</sup> According to Rabbi Yosef Shalom Elyashiv, on the other hand, as long as society supports vaccinating, not vaccinating is negligent, even if the risk of an outbreak is small.<sup>146</sup> Rabbi Breitowitz quotes Rabbi Tatz:

“[F]ailure to immunize would amount to negligence . . . refusing childhood immunizations on the basis of unsubstantiated fears of vaccine side-effects is irresponsible . . . the danger of precipitating epidemics of measles, poliomyelitis and other diseases with potentially devastating complications is far more real than the dangers attributed to vaccines on the basis of anecdotal claims. Until objective evidence to

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140. See Grabenstein, *supra* note 126, at 2014.

141. Rabbi Yitzchak Breitowitz, *Vaccinations and Halacha*, OHR SOMAYACH (Aug. 24, 2013), <http://ohr.edu/5503>.

142. *Id.*

143. *Id.*

144. Halacha is a set of Jewish rules and practices. See *What is Halakha?*, JEWFAQ, <http://www.jewfaq.org/halakha.htm> (last visited Aug. 1, 2014).

145. *Id.*

146. *Id.*

the contrary accrues, the halachically correct approach is to do what is normal.”<sup>147</sup>

Echoing this view, several Jewish scholars weighed in on the question of whether immunizations of children who will attend school are obligatory.<sup>148</sup> These scholars concluded that a requirement was justified, and that immunizations are appropriate. Rabbi Milgram, citing responses to the question of whether schools have the right to refuse admission to unvaccinated children, stated that Jewish scholars generally agree that schools have such a right. This conclusion is rooted, according to the scholars Milgram cites, in the law of the land (state requirements) and the Jewish principle of “pikvach nefesh,” the mitzvah (good deed) of saving as many lives as possible. He explains:

Judaism, across the board, within every denomination, aspires to life for those born into this world. In Deuteronomy (Devarim) 4:15 we learn: V'nishmartem m'ode l'nafshoteikhem, “Greatly guard your souls,” which has long been read in Jewish bioethics as a duty to protect ourselves from disease. Reb Nachman of Breslov, who died in 1810 of tuberculosis long before treatment and a vaccine had been identified in the second half of the twentieth century, wrote: “One must be very very careful about the health of children . . . One must inoculate every baby against smallpox before one-fourth (3 months) of the year, because if not, it is like spilling blood (murder).”<sup>149</sup>

Rabbi Elliot Kaplowitz said:

The overwhelming consensus in the medical community is that immunization is a necessary and simple step to prevent the spread of disease. Certainly if one takes the approach that there is a positive commandment to proactively safeguard one's health, it seems to me that immunization is a necessary measure. In the context of this debate one also hears the argument that it is selfish to not immunize because of the potential threat this poses to others. An analogy may be built to discussions in the Talmud of one who places a hazardous item in the public thoroughfare. Such a person is negligent for any damages caused.

As a final thought, there are those who undoubtedly will refuse to immunize their children. I am reminded of the Gemara's discussion of the verse from Psalms 116:6 The Lord protects the foolish/simple.<sup>150</sup>

Rabbi Noam Raucher, from the Conservative Jewish movement, says:

The Jewish view regarding immunizations for children at either Jewish day or parochial schools is one of obligation on the part of the parent to do so. The Jewish tradition considers fulfilling this obligation under

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147. *Id.* (quoting AKIVA TATZ, DANGEROUS DISEASE AND DANGEROUS THERAPY 48 (2013)).

148. Rabbi Dr. Goldie Milgram et al., *Regarding Immunizations for Children Who Will Be Attending Day (Jewish or Parochial) Schools: What is the Jewish View on Whether This is Obligatory or Optional? What Jewish Values or Ethics are Involved in This Question?*, JEWISH VALUES ONLINE, <http://www.jewishvaluesonline.org/566> (last visited Aug. 1, 2014).

149. *Id.* (citation omitted)

150. *Id.*

and number of precepts which pertain to: The health and safety of the child, the health and safety of the community at large, the need for preventative health care and abiding by the law of the land. (All extensively addressed in Rabbi Joseph Prouser's *teshuvah*, Jewish legal ruling, on this matter for the Conservative movement's Committee on Jewish Law and Standards).<sup>151</sup>

Rabbi Mark Washofsky provides the perspective of the Reform Jewish movement:

In 1999, the [Responsa Committee of the Central Conference of American Rabbis (CCAR), the association of Reform Rabbis] was asked about a congregation's policy to require certain immunizations before children would be allowed to attend the congregational school. Some parents, who regarded immunization as excessively risky, refused to have their children immunized and challenged the policy. The congregation wanted to know whether its policy was "correct and justifiable according to Jewish tradition."

In its responsum (opinion; *teshuvah*), the committee answered "yes." In arguing for its conclusion, the responsum makes several points. First, Jewish law defines the practice of medicine as a mitzvah, an act that enables us to fulfill the obligation of *pikuach nefesh* (the preservation of human life), which our tradition regards as perhaps the greatest mitzvah of all. Second, immunization has become accepted the world over as an integral and vital element in the practice of medicine. As with any other medical procedure, there are indeed risks involved with immunization. But the responsum found that: a) these risks are far outweighed by the benefits that immunization provides; b) the scientific community has established effective programs to supervise vaccine safety; and c) by refusing to immunize their children, parents endanger not only the health of those children but of other members of the community who remain susceptible to the disease even after they have been immunized. For all these reasons, the responsum concluded that a congregation or school is well within its rights to adopt a compulsory immunization policy.<sup>152</sup>

Even the presence of pork gelatin in some vaccines did not lead scholars to conclude otherwise. In response to an inquiry from Public Health England, Rabbi Abraham Adler from the Kashrus and Medicines Information Service said, "It should be noted that according to Jewish laws, there is no problem with porcine or other animal derived ingredients in non-oral products. This includes vaccines, including those administered via the nose, injections, suppositories, creams and ointments."<sup>153</sup>

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151. *Id.*

152. *Id.*

153. *Vaccines and Gelatin: PHE Response*, Gov.UK, <https://www.gov.uk/government/news/vaccines-and-gelatine-phe-response> (last visited Aug. 1, 2014); see *Religious Approval for Porcine-Containing Vaccines*, INST. FOR VACCINE SAFETY (July 21, 2003), <http://www.vaccinesafety.edu/Porcine-vaccineapproval.htm> (last visited Aug. 1, 2014); Kashrut Authority of Australia & NZ, FACEBOOK (last visited Aug. 1, 2014), <https://www.facebook.com/groups/221124927937142/permalink/516889978360634/>

When a specific Rabbi voiced opposition to vaccination,<sup>154</sup> he based his opinion not on halachic principles, but on safety concerns based on his acceptance of anti-vaccine claims, including the debunked claim that vaccines cause autism.<sup>155</sup> I have found no halachic analysis opposed to vaccines.

## 2. *Islam*

Some fundamentalist Muslim organizations in some regions have denounced vaccination efforts as American plots to sterilize Muslim populations and as efforts to avert the will of Allah.<sup>156</sup> Other Muslim organizations that oppose vaccines, alleging that they disrupt the order of Allah's creation in that they are money-making plots for drug companies of doubtful benefit (a general anti-vaccine theory in some Muslim communities).<sup>157</sup> However, other Islamic sources have indicated that immunizations are consistent with Islamic principles.

For example, in one fatwa—a religious opinion on a matter of Islamic Law by an Islamic scholar—Shayh Bin Baaz said:

[T]he Prophet (peace and blessings of Allaah be upon him) said, according to the saheeh hadeeth, "Whoever eats seven dates of Madeenah in the morning will not be harmed by witchcraft or poison." This is a kind of warding off a problem before it happens. So if there is the fear of sickness and a person is vaccinated against an infection that is present in the land or elsewhere, there is nothing wrong with that, because it is a kind of protection.<sup>158</sup>

Similarly, a fatwa by the Islamic Fiqh Academy stated that:

Prevention of disease through vaccination is not a negation of trust in Allah . . . . Indeed, real trust in Allah cannot be achieved except by embracing the apparent causes which Allah has designed, by destiny or

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?comment\_id=524087324307566&offset=0&total\_comments=123 (discussing an Australian point of view by Rabbi Gutnick).

154. Rabbi William Handler, *The Measles Scare and CDC Politics*, JEWISH PRESS (July 10, 2013), <http://www.jewishpress.com/indepth/the-measles-scare-and-cdc-politics/2013/07/10>.

155. *Id.* For an analysis of the problematic nature of that claim, see generally Stanley Plotkin et al., *Vaccines and Autism: A Tale of Shifting Hypotheses*, 48 CLINICAL INFECTIOUS DISEASES 456 (2009).

156. Maryam Yahya, *Polio Vaccines—Difficult to Swallow, The Story of a Controversy in Northern Nigeria* 9–10 (Inst. Dev. Studies, Working Paper No. 261, 2006), available at <http://www.ids.ac.uk/files/Wp261.pdf>; Haider J. Warraich, *Religious Opposition to Polio Vaccination*, 15 EMERGING INFECTIOUS DISEASES 978, 978 (2009).

157. Dr. Aisha Hamdan, *Immunizations—Harmful to Your Child or Not?*, MISSION ISLAM, <http://www.missionislam.com/health/immunizationhurtornot.htm> (last visited Aug. 1, 2014); *Farrakhan Suspicious of H1N1 Vaccine*, UNITED PRESS INT'L (Oct. 19, 2009, 11:56 PM), [http://www.upi.com/Top\\_News/US/2009/10/19/Farrakhan-suspicious-of-H1N1-vaccine/UPI-63931256011008](http://www.upi.com/Top_News/US/2009/10/19/Farrakhan-suspicious-of-H1N1-vaccine/UPI-63931256011008).

158. Shayh Bin Baaz, *Ruling on Giving Treatment Before Sickness Occurs*, ISLAMIC ARTICLES, <http://islamicarticles.wordpress.com/medicine> (last visited Aug. 1, 2014).

by law, as requirements to produce effects. Thus, not giving vaccination could be a prohibition if it causes harm.<sup>159</sup>

And Dr. Hatem Al-Hajj, Dean of Shari'ah Academy of America, said:

As for the use of vaccines in general, the late Mufti of Saudi Arabia Sheikh Abdul-Aziz Ibn Baz said, "There is nothing wrong with giving medicine to ward off a feared disease, because the Prophet (peace and blessings be upon him) said, '**Whoever eats seven dates of Medina in the morning will not be harmed by witchcraft or poison**'" (Al-Bukhari).

In fact, the Islamic Fiqh Academy of the Organization of the Islamic Conference (OIC) considered vaccines important enough for public safety that they did not require the patient's permission for vaccination (especially in such cases as epidemics). OIC decision no. 67 (7/5) stipulated, "A guardian is entitled to obligate patients to have medical treatment in some cases, such as if they suffer an infectious disease or in the case of preventive vaccination."<sup>160</sup>

Most recently, a group of Muslim scholars from several Islamic states held a conference on how to protect Islamic children from the poliovirus, and concluded that Muslim parents are religiously obligated to vaccinate their children.<sup>161</sup>

Like Jewish scholars, Muslim scholars also addressed the issue of pork gelatin in some vaccines, concluding that it does not preclude vaccination. In 1995, the Islamic Organization for Medical Sciences convened a seminar in Kuwait on the topic of "The Judicially Prohibited and Impure Substances in Foodstuff and Drugs." The World Health Organization reported that:

The seminar issued a number of recommendations . . . stipulating, inter alia, that: "Transformation which means the conversion of a substance into another substance, different in characteristics, changes substances that are judicially impure . . . into pure substances, and changes substances that are prohibited into lawful and permissible substances."<sup>162</sup>

Consequently, the scholars determined that the transformation of pork products into gelatin alters them sufficiently to make it permissible for observant Muslims to receive vaccines containing pork gelatin and to

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159. *Statement from the International Islamic Fiqh Academy to Encourage Vaccination Against Polio*, COMMUNITATIVE (Sept. 30, 2009 10:30 AM), <http://www.comminit.com/?q=polio/node/303223>.

160. *Doubts About Vaccination*, ONISLAM.NET (Feb. 20, 2011), <http://www.onislam.net/english/ask-the-scholar/fiqh/451044-vaccines-and-the-dangerous-ingredients-therein.html> (emphasis in original).

161. Tahir Khan, *Polio Eradication: Muslim Scholars Deny Polio Vaccine Rumours*, EXPRESS TRIBUNE (Mar. 10, 2013), <http://tribune.com.pk/story/518534/polio-eradication-muslim-scholars-deny-polio-vaccine-rumours>.

162. Letter from Dr. Hussein A. Gezairy, Regional Director, Reg'l Office of the World Health Org. for the E. Mediterranean, to Dr. Zaffron, et al. (July 17, 2001), available at <http://www.immunize.org/concerns/porcine.pdf>.

take medicine packaged in gelatin capsules.<sup>163</sup> Dr. Hatem Al-Hajj also said:

As for impure additives, if any, they are too insignificant to be considered, and they are often processed into completely different substance. The ruling adopted by majority of contemporary Muslim scholars, and supported by a decision of the Islamic Fiqh Academy, is to avoid impurities such as gelatin in medicines unless there is no alternative to a particular impurity-containing medicine, in which case it may be consumed (that does not include unconsumed wine specifically).<sup>164</sup>

### 3. Christianity

Because it is impossible to cover all sub-divisions of Christianity, this Subpart only addresses the larger groups.

#### a. Catholics

The focus of the discussion in Catholic sources is on whether it is permissible for parents to vaccinate children with vaccines for which the viruses were grown using cell lines derived from abortions. Responding to these concerns, the Catholic Church made a strong statement in support of vaccination as protecting the public health, children, and others. The Pontifical Academy for Life discussed the question in 2005, and issued a thorough document concluding that if an alternative product was accessible and just as effective, parents should use that product. But the group also concluded that where no such alternative exists, parents should use the vaccines derived from the cell line to prevent harm to their own children and others, especially pregnant women.<sup>165</sup> In fact, the opinion explained the moral obligation parents have to vaccinate against rubella:

This is particularly true in the case of vaccination against German measles, because of the danger of Congenital Rubella Syndrome. This could occur, causing grave congenital malformations in the foetus, when a pregnant woman enters into contact, even if it is brief, with children who have not been immunized and are carriers of the virus. In this case, the parents who did not accept the vaccination of their own children become responsible for the malformations in question, and for the subsequent abortion of foetuses, when they have been discovered to be malformed.<sup>166</sup>

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163. *Id.*

164. *Doubts About Vaccination*, *supra* note 160.

165. Pontifical Academy for Life, *Moral Reflections On Vaccines Prepared From Cells Derived from Aborted Human Fetuses*, 6 NAT'L CATH. BIOETHICS Q. 541 (2006); see Rev. Tadeusz Pacholczyk, *The Morality of Vaccinating Our Children*, NAT'L CATH. BIOETHICS CTR. (Aug. 1, 2005), <http://www.ncbcenter.org/page.aspx?pid=251>.

166. Pontifical Academy for Life, *supra* note 165, at n.15.

In other words, if a family decided not to vaccinate and a child infected a pregnant woman with rubella, the parents who chose not to vaccinate are responsible for harm to the fetus.

*b. Methodists*

The United Methodist Church has expressed its opposition to vaccines containing mercury, and urged removal of the preservative thimerosal from vaccines.<sup>167</sup> In spite of this concern, however, the United Methodist Church did not recommend avoiding vaccines, instead recommending: “[U]ntil mercury is banned from medicine, the medical missions, hospitals, clinics and ministries of The United Methodist Church strongly encourage use of mercury-free vaccines over mercury-containing ones.”<sup>168</sup> Even while advocating for a change, and expressing concern about the contents of some vaccines, the church is not recommending avoidance of vaccines.

As a side note, vaccines have not contained thimerosal since 2001, with the exception of multi-dose flu vaccines, and even so, it has never been connected to harm.<sup>169</sup>

*c. Lutherans*

The Evangelical Lutheran Church in America has expressed its support of vaccination at different times in several different contexts. For example, in a position paper on death in 1982, the church said:

Today it is commonplace to speak of the triumphs of modern medicine—achievements such as open heart surgery and organ transplants, dialysis machines that substitute for the kidneys, pacemakers that regulate the beating of the heart, and vaccines that have made once-dreaded diseases almost forgotten words. Each of these discoveries has saved countless lives and relieved much suffering.<sup>170</sup>

The church engages in numerous efforts to provide vaccines to those who need them, demonstrating in action its support of immunization. For example, the Church’s Website gives members the option of donating specifically to provide vaccines. The Church points out that it “is estimated that more than 5,000 children and adults die each day from diseases that could be prevented by vaccinations. Immunizing a child against preventable diseases like polio, tetanus, diphtheria, pertussis and

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167. *Protecting Children from Mercury-Containing Drugs*, UNITED METHODIST CHURCH, <http://www.umc.org/what-we-believe/protecting-children-from-mercury-containing-drugs> (last visited Aug. 1, 2014).

168. *Id.*

169. *Vaccines and Thimerosal*, CHILDREN’S HOSP. PHILA., <http://www.chop.edu/service/vaccine-education-center/vaccine-safety/vaccine-ingredients/thimerosal.html> (last visited Aug. 1, 2014).

170. LUTHERAN CHURCH IN AM., *DEATH AND DYING I* (1982), available at [http://download.elca.org/ELCA%20Resource%20Repository/Death\\_and\\_DyingLCA82.pdf](http://download.elca.org/ELCA%20Resource%20Repository/Death_and_DyingLCA82.pdf).

measles will help him or her live a long, healthy life.”<sup>171</sup> A quick Google search reveals that a large number of Lutheran schools require vaccinations,<sup>172</sup> and that several Lutheran churches offer low-cost vaccination clinics.<sup>173</sup>

*d. Church of Jesus Christ of Latter Day Saints (Mormons)*

Since at least 1978, the Church of Jesus Christ of Latter Day Saints (“LDS”) has been adamantly pro-vaccine, as indicated by this statement from the First Presidency: “We urge members of The Church of Jesus Christ of Latter-day Saints to protect their own children through immunization. Then they may wish to join other public-spirited citizens in efforts to eradicate ignorance and apathy that have caused the disturbingly low levels of childhood immunization.”<sup>174</sup> Recently, LDS has made immunization an official initiative, joining other humanitarian initiatives, such as clean water and food production, as a focus for LDS volunteer efforts.<sup>175</sup>

*e. Episcopalians*

The Episcopalian church has expressed its support of vaccination efforts in Africa. Among other things, Katharine Jefferts Schori, the Presiding Bishop of the Episcopal Church of the United States, said:

Polio is a terrible disease. that’s been eradicated from most parts of the world. People, especially children, still get the disease in Pakistan, Afghanistan, and Nigeria—and almost nowhere else. The campaign to end polio has been working very hard to vaccinate children and wipe out the virus, and it could probably be accomplished within five years. Only a few hundred children are infected and paralyzed each year, but eliminating the disease means vaccinating large populations so no one can pass on the virus. Those nations where polio still survives have large groups of people who are very suspicious of the vaccine campaigns. A number of health workers have been murdered because of those suspicions—that the vaccine actually has HIV in it, or some

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171. *Vaccinations for a Child*, EVANGELICAL LUTHERAN CHURCH IN AM., [https://community.elca.org/GoodGifts-Health-care?&nccsm=21&\\_\\_nccspID=1059](https://community.elca.org/GoodGifts-Health-care?&nccsm=21&__nccspID=1059) (last visited Aug. 1, 2014).

172. *Immunizations*, PAC. LUTHERAN UNIV., <http://www.plu.edu/health-center/new-students/immunizations/home.php> (last visited Aug. 1, 2014).

173. See, e.g., *Flu Vaccine FAQ*, ROCHESTER CENT. LUTHERAN SCH., <http://www.rcls.net/wpweb/flu-vaccine-faq> (last visited Aug. 1, 2014); *Concordia to Offer Flu Vaccine Clinic at Oktoberfest*, CONCORDIA LUTHERAN MINISTRIES, <http://www.concordialm.org/news/press-room/2-uncategorised/98-clinic-at-oktoberfest> (last visited Aug. 1, 2014); *Blood Drive and Flu Shot Clinic*, LORD OF LIFE CHURCH, <http://www.lolchurch.net/blood-drive-and-flu-shot-clinic> (last visited Aug. 1, 2014).

174. *Immunize Children, Leaders Urge*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, <http://www.lds.org/liahona/1978/07/immunize-children-leaders-urge?lang=eng> (last visited Aug. 1, 2014).

175. Heather Whittle Wrigley, *Church Makes Immunizations an Official Initiative, Provides Social Mobilization*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS (June 13, 2012), <http://www.lds.org/church/news/church-makes-immunizations-an-official-initiative-provides-social-mobilization> (last visited Aug. 1, 2014).



kind of poison or contraceptive, or that American spies are using the campaign for other purposes. There aren't enough security forces to protect all the health workers, but brave people keep signing up to help because they believe so fervently in the possibility of healing. That's mission—offering yourself as a living sacrifice.<sup>176</sup>

Schori also asserted:

In some parts of the world, those who vaccinate children or educate girls or liberate the poor are offering their very lives out of this audacious and holy hope. In all those labors we believe that God has given us what is necessary. We believe this underlies efforts toward self-sustainability.<sup>177</sup>

#### *f. Presbyterians*

A request for information to the Presbyterian Church led to the following email response:

We appreciate your inquiry as to formal statements of our General Assembly on the subject of vaccination of children or adults in relation to our faith stance. You are correct in understanding our position in general to support scientific medicine at every point, without denying the holistic reality of our embodied selves. Susan Stack and Bonnie Hoff have both gone through our past social policies and found one recent instance where vaccination campaigns are endorsed (probably with the assumption that these campaigns are needed overseas).

My own quick look at sources not online shows missionary nurses in New Mexico in 1928 putting an emphasis on vaccination (p. 161, 1928 Report of the Board of National Missions). A 1937 report supportive of the US Public Health Service went so far as to affirm their work in preventing venereal diseases among old and young: "We urge the fullest cooperation with national, state, and local agencies in the promotion of social hygiene activities."

Thus, while voluntary language and encouragement may be used at various points in our social witness policies, the presumption would be in favor of public resources being used for the highest possible levels of public health and safety.

Please let us know if there are other concerns. We have fairly extensive health policies and continue some health work, mainly overseas.<sup>178</sup>

#### C. EVEN SECTS OPPOSED TO MODERN MEDICINE DO NOT PROHIBIT VACCINES

Supporters of religious exemptions often suggest that they are especially important for small, potentially persecuted minorities like

176. Katharine Jefferts Schori, *St. Peter's—Confirmation/Eucharist*, EPISCOPAL CHURCH (July 23, 2013), <http://www.episcopalchurch.org/page/st-peters-confirmationeucharist>.

177. Katharine Jefferts Schori, *Day of Ascension—Global Episcopal Mission Network*, EPISCOPAL CHURCH (May 9, 2013), <http://www.episcopalchurch.org/page/day-ascension-global-episcopal-mission-network>.

178. Email from Rev. Christian T. Iosso, Ph.D., Coordinator at the Advisory Committee on Social Witness Policy, to David Coolidge (Nov. 1, 2013) (on file with author).

Jehovah's Witnesses and Christian Scientists. Examination of these groups' positions on vaccines led to a surprising conclusion: neither group prohibits vaccination.

### 1. JEHOVAH'S WITNESSES

Early Jehovah's Witnesses were strongly against vaccination, based on a Biblical prohibition of the eating of blood.<sup>179</sup> However, in response to a 1961 question regarding vaccination and the eating of blood, the Watchtower responded that the entire medical practice involving the use of blood is objectionable:

[H]owever, vaccination is a virtually unavoidable practice in many segments of modern society, and the Christian may find some comfort under the circumstances in the fact that this use is not in actuality a feeding or nourishing process, which was specifically forbidden when that man was not to eat blood, but it is a contamination of the human system. So, as was stated in *The Watchtower* of September 15, 1958, page 575, "It would therefore be a matter of individual judgment whether one accepted such types of medication or not." That is still the Society's viewpoint on the matter.<sup>180</sup>

This position appears to be consistent with current Jehovah's Witness position that prohibits blood transfusions, but accepts that the majority of medical procedures do not conflict with the Bible.<sup>181</sup> Therefore, personal choice is involved and "one Witness might decide to accept a particular . . . treatment, while another Witness might reject that same treatment."<sup>182</sup>

### 2. CHRISTIAN SCIENTISTS

Of all religions, Christian Scientists can probably make the strongest claim that they oppose vaccines. However, a believer would not be put in a position of choosing between obeying the law and their faith if the religious exemptions did not exist. While Christian Scientists believe in the healing power of prayer rather than modern medicine,<sup>183</sup> Mary Baker Eddy, the founder of Christian Science, said, on the topic of vaccination, that "rather than quarrel over vaccination, [she] recommend[s], if the law

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179. *The Golden Age*, JEHOVAH'S WITNESSES (Jan. 3, 1923) 214; *The Sacredness of Human Blood*, GOLDEN AGE, Jan. 3, 1923, at 293, 293 ("Vaccination is a direct violation of the everlasting covenant that God made with Noah after the flood.").

180. *The Watchtower* (Nov. 1, 1961) 670.

181. *Do Jehovah's Witnesses Accept Medical Treatment?*, JEHOVAH'S WITNESSES, <http://www.jw.org/en/jehovahs-witnesses/faq/jehovahs-witnesses-medical-treatment> (last visited Aug. 1, 2014).

182. *Id.*

183. *Science and Health*, CHRISTIAN SCIENCE, [http://christianscience.com/read-online/science-and-health/\(chapter\)/chapter-i-prayer#anchor.1.1](http://christianscience.com/read-online/science-and-health/(chapter)/chapter-i-prayer#anchor.1.1) (last visited Aug. 1, 2014).

demand, that an individual submit to this process, that he obey the law, and then appeal to the gospel to save him from bad physical results.”<sup>184</sup>

Based Eddy’s reasoning, among other things, one Christian Scientist who was told to get vaccinated before his military travels agreed to the vaccines. In explaining his decision, he stated:

First, I reasoned that the work I was to undertake as a chaplain would be a blessing for the troops involved in the training exercise. Then, I checked what Mary Baker Eddy had written about one form of inoculation—in this case, vaccination . . . .

...

Finally, I reasoned that the military personnel who had established these rules were trying to take care of others out of honest concern for their protection—and I respected their stance. This was their way of loving their neighbor. So I took the inoculations the afternoon we left, without in any way surrendering my standpoint that God was the greater protective power. I’m grateful to say I didn’t have any of the side-effects I was told I might suffer.<sup>185</sup>

#### D. PEOPLE SAY THAT IT IS NOT ABOUT RELIGION

In numerous statements on anti-vaccination websites, people openly say that this is not about religion. Extensive advice is provided on such Websites to help parents obtain religious exemptions. This Subpart focuses on people who openly state that they lie about religion. This Subpart does not focus drafts of requests for religious exemption;<sup>186</sup> advice on specific religious claims parents can make and how to word them;<sup>187</sup> warnings not to go into too much detail about your religious

184. MARY BAKER EDDY, *THE FIRST CHURCH OF CHRIST, SCIENTIST, AND MISCELLANY* 219–20 (1917); CHRISTIAN SCIENCE SENTINEL, <http://sentinel.christianscience.com/concordapi/view?q=quarrel+vaccination&book=tfccs.main.pw.my&verbatim=1> (last visited Aug. 1, 2014).

185. Ryder Stevens, *Worldwide Immunity Through Prayer*, CHRISTIAN SCIENCE SENTINEL (May 26, 2003), <http://sentinel.christianscience.com/shared/view/1l9mvxk1tvc?s=t> (citation omitted).

186. *Hints for Religious Exemptions to Immunizations*, VACCINEINFO.NET (Apr. 5, 2008), <http://www.vaccineinfo.net/exemptions/relexemptlet.shtml>; *Sample Religious Exemption Letter and Supporting Documentation*, PLANET INFOWARS, <http://planet.infowars.com/health/vaccine-exemption-example-letter-2> (last visited Aug. 1, 2014).

187. *FAQ: Religious Exemption*, K.N.O.W. VACCINES, [http://www.know-vaccines.org/?page\\_id=28](http://www.know-vaccines.org/?page_id=28) (last visited Aug. 1, 2014) (“Vaccines are made with toxic chemicals that are injected into the bloodstream by vaccination. All vaccines are made with foreign proteins (viruses and bacteria), and some vaccines are made with genetically engineered viral and bacterial materials. A conflict arises if you believe that man is made in God’s image and the injection of toxic chemicals and foreign proteins into the bloodstream is a violation of God’s directive to keep the body/temple holy and free from impurities. A conflict arises if you accept God’s warning not to mix the blood of man with the blood of animals. Many vaccines are produced in animal tissues. A conflict arises if your religious convictions are predicated on the belief that all life is sacred. God’s commandment ‘Thou Shall Not Kill’ applies to the practice of abortion.”); *Letter for Religious Exemption to Mandatory Vaccination*, GOLDRUST.NET, <http://www.goldrust.net/religion.htm> (last visited Aug. 1, 2014) (citing various religious scripture references to use in letters); *Religious Conviction*, K.N.O.W. VACCINES, [http://www.know-vaccines.org/?page\\_id=247](http://www.know-vaccines.org/?page_id=247) (last visited Aug. 1, 2014) (citing various religious scripture references to

beliefs;<sup>188</sup> and so on. The names of the individuals quoted below have been hidden to preserve their identities.<sup>189</sup>

### 1. *Real Concern: Safety*

Some comments indicate that the real concern is safety, with the religious argument being used as a way to evade the obligation to vaccinate.<sup>190</sup> For example, one comment states:

“My sister is living in NM and needs to get a vaccine waiver for her 2 children. Her son has some shots but due to his backtracking after a series of vaccines she is not wanting to do anymore [sic] at this time. She needs to get him enrolled in school but they only accept medical or religious exemptions. She has to right [sic] the reason for her ‘religious beliefs’ against the kids being vaccinated and then it has to be approved. What is the best wording for her to use for this?”—Anonymous<sup>191</sup>

The real reason is clearly not religious. Similarly, another poster explains:

I claim a religious exemption even though I selectively vaccinate and I’ve given more vaccines to my older children than younger. I DO NOT EXPLAIN IT. I simply state that I’m taking a religious exemption.

IF I were questioned on it...I would say that I believe my religion commands me to make decisions in the best interests of my child, and as I have researched vaccines, I have decided that certain vaccines are not in my child’s best interest.

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use in letters); Sarah\_bar84, Comment to *Letter Requesting Religious Exemption for Forced Flu Vax... What Do You Think?*, BABYCENTER (Aug. 12, 2012), [http://community.babycenter.com/post/a35633233/letter\\_requesting\\_religious\\_exemption\\_for\\_forced\\_flu\\_vax...what\\_do\\_you\\_think](http://community.babycenter.com/post/a35633233/letter_requesting_religious_exemption_for_forced_flu_vax...what_do_you_think) (“As a practicing Christian, I believe that my body is a gift from God and a temple of the Holy Spirit (see 1 Corinthians 6:19,20), and that it must not be polluted (see 2 Corinthians 7:1).”); *Religious Convictions*, VACCINATION LIBERATION, <http://www.vaclib.org/news/religion.htm> (last visited Aug. 1, 2014) (citing various religious scripture references to use in letters).

188. See *FAQ Religious Exemption*, K.N.O.W. VACCINES, [http://www.know-vaccines.org/?page\\_id=28](http://www.know-vaccines.org/?page_id=28) (last visited Aug. 1, 2014) (“When requesting a religious exemption, it is NOT necessary to provide any administrative evidence that proves your religious beliefs. Any agent acting on behalf of the state in compliance with vaccine mandates may not ask for religious documentation, letters from religious leaders, or church membership. It is also not necessary to discuss any other particulars regarding your beliefs or your child’s health history.”); see also *Religious Exemption in New Jersey*, VACCINATION LIBERATION (Aug. 13, 2003), <http://www.vaclib.org/chapter/exemptnj.htm> (“In June of this year one family in Senator Martin’s District 26 used my religious exemption letter and the Health Department rejected it because it was ‘too long.’”); Twoplussixis8, Comment to *Immunization Exemption Letter*, MOTHERING (May 2, 2008), <http://www.mothering.com/community/t/890537/immunization-exemption-letter>.

189. This was done pursuant to the IRB exemption determination. See *supra* note 6.

190. See *supra* Part II.A (discussing the case of Mary Check).

191. See *infra* Appendix A, Figure 2.

My advice is to say as little as possible. Do not put more “out there” to be challenged than you need to.<sup>192</sup>

She wants to refuse vaccines based on her “research,” and hopes to use the religious exemption, although her main concern is not based religion.

The parent who posted the following comment is clearly focused on her child’s safety rather than having real religious motivation:

From a fan:

“Should I be concerned that when my child enters school the religious exemption may no longer ‘be allowed’?? I have a 13 month old and the more research I do, the more and more certain I become that I do not want to vaccinate. Should I go ahead and complete the steps for religious exemption?? My thoughts are if they ever do make it MANDATORY I would be grandfathered in. We live in Virginia. Thanks for your guidance.”<sup>193</sup>

## *2. People Using a Religion They Do Not Believe In or Supporting a Fake Religion*

In other cases, parents explain that they will assert that they follow a religion that is not their own, or even create a fake religion, to obtain an exemption. For example:

I am sure there will be exemptions allowed: Medical and Religious for sure! There has to be!!!! Note [sic] hard to find Bible verses to prohibit immunizations. Check out the verses that Christian Scientist use. I am not a CS but I used these verses to qualify for religious exemption for my 3 sons ..... grade school thru [sic] college. No problem!!!!

If not ..... expect to see a spike in adverse reactions.<sup>194</sup>

Similarly, one non-Catholic parent used a Catholic organization to obtain her exemption: “I am one of the administrators for the page here in Michigan and obtained a religious exemption within my Catholic organization. I am not Catholic but they accepted it.”<sup>195</sup>

The parent who posted the following, no longer a practicing Christian Scientist, attended Church on a few occasions just to get the exemption:

I don’t know much about NJ but I grew up Christian Scientist (not to be confused with Scientology!!!) and therefore was exempt from receiving all of my shots as a child & into adulthood. You may have to go to church a few times but if you get a letter that exempts your child from receiving vac’s [sic] due to religious views, then it’s worth it. I’ll admit, I no longer attend this church, however, I’ve had to make a few appearances so that when it comes time to put my LO in daycare (she’s almost 5 months) I’ll be prepared. So my suggestion is to find a

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192. See *infra* Appendix A, Figure 3.

193. See *infra* Appendix A, Figure 4.

194. See *infra* Appendix A, Figure 5.

195. See *infra* Appendix A, Figure 6.

Christian Science church... It's 1/2 Christian and 1/2 mind over matter applied science of the mind. No brainer. GL!<sup>196</sup>

Finally, this parent encouraged others to join a church—for a donation—for the sole purpose of obtaining the religious exemption, no sincerity needed:

[P]ossible solution for religious exemption people—join the Alphabiotic alignment unification church and be exempt. [J]ust find a local alphabiotist office and join for minimal donation and you are in. [A]lso one question—do parents need to go for exemption to md every year or just once for the kids' life? every year will suck and drive md's [sic] crazy. [O]nce is not so bad.<sup>197</sup>

### 3. *Clear Lies*

Several people openly admit that they lie and discuss the morality of it. This parent, for example, uses a religious exemption in spite of being an atheist:

I filed a religious exemption in VA and no one batted an eye or questioned my beliefs. I'm actually an atheist but it's the only exemption option, aside from medical in VA. Once I was asked by a nurse at the dr.'s office about my religion but just told her that I believe religion is a personal thing and I don't like to discuss it.<sup>198</sup>

This parent also admits to using the religious exemption even though she is an atheist:

Comment 1: Its not there [sic] business what your religion. Twll [sic] them to take tge [sic] exemption or hear from your lawyer. I use one for daycare in nj right now.

Comment 2: Religion = whatever I say it means. That's the beauty of it.

Comment 3: If you whole heartedly believe that vaccines are a danger, that is a religiously held belief ☺ I am also an atheist and claim religious exemptions.<sup>199</sup>

Another parent openly stated that she lied on her religious exemption. In response to this claim, one group stated, "Be careful what you put here. This is a public site." In response, the original poster said, "[M]y kids are adults now. So I don't have to lie."<sup>200</sup>

One parent openly admitted, "I use a religious exemption in Iowa and my older children are fully vaccinated. No problems at all :) and I'm not even religious...if any one asks ill [sic] tell them I worship at the house of my own family."<sup>201</sup> In response, another poster said, "[Y]ou can use philosophical. [M]y daughter had her vaccines until she was 2 and i

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196. *See infra* Appendix A, Figure 7.

197. *See infra* Appendix A, Figure 8.

198. *See infra* Appendix A, Figure 9.

199. *See infra* Appendix A, Figure 10.

200. *See infra* Appendix A, Figure 11.

201. *See infra* Appendix A, Figure 12.

use that exemption, and im in ohio [sic]. [J]ust write a note saying u [sic] are not vaccinating and are using that exemption and turn in the shot record.”<sup>202</sup>

Other parents advised a parent who openly stated that she was an atheist that she could, nonetheless, obtain the religious exemption. The initial poster asked, “Anyone else here in New Jersey that don’t vaccinate [sic] and their kids are in public school? I’m trying to look for a way around this vaccinating thing. We currently have a medical and religious exemption. Being an atheist I don’t think that the religious exemption is going to work.” In response, others responded, “You don’t have to disclose a religion,” “Oh, it will work ☺,” and:

Yeah, you don’t disclose what religion and it’s illegal for anyone to even ask you. My husband is Jewish and I’m an agnostic heathen, but if we ever choose not to home school (we do live in NJ, but are home schooling for now) we’ll be using the religious exemption. In all honesty I would fake a religion if I had to, just to keep away the vaccines.<sup>203</sup>

Openly admitting she is not religious, this parent asked what she should say—though it would be untrue—to obtain a religious exemption:

My daughter was fully vaxed til nine months old and we are now stopping all vax at one year. I plan to homeschool her but you never know what will happen. [ ] does not allow philosophical exemption. We are not religious at all but obviously that would be the one we would use. What would we say, what is the actual reason why it conflicts religiously? Thanks!<sup>204</sup>

Finally, this parent claims to be unrepentant about her decision to lie to obtain a religious exemption, blaming her state for not having a philosophical exemption, “I know others that are made that certain ppl [sic] like me are lying about our religion. Im [sic] an atheist but I use a religious waiver for my kid. I fully think there should be philosophical exemptions in every state.”<sup>205</sup>

In short, these parents openly admit to lying to obtain the religious exemption. Consider that these are only those who are willing to admit their lies on an open forum on the Internet.

### III. WHAT ARE THE OPTIONS?

As discussed, the religious exemption offered in several states is vulnerable to abuse, and is indeed abused. Part of what makes it vulnerable to abuse is our jurisprudence, as set out in Part I. I agree with much of this jurisprudence: there are real dangers in allowing states to

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202. *Id.*

203. *See infra* Appendix A, Figure 13.

204. *See infra* Appendix A, Figure 14.

205. *See infra* Appendix A, Figure 15.

police religion (as will be clear from the first option I propose). Courts' hesitation to allow the executive to monitor religion is understandable, and potentially justified. But this may lead to an increase in insincere religious exemptions. This is problematic for two reasons. First, as the rates of exemptions rise, herd immunity is eroded and the chances of an outbreak increase.<sup>206</sup> Second, by making the exemption contingent on religious beliefs, states that do not have a philosophical exemption are pushing those who have non-religious reasons to lie.

These two problems can be handled in one of three ways. First, states could keep the religious exemption but make it difficult to obtain and provide agencies with strong tools to police the exemption. Second, states could remove all exemptions except medical ones. Third, states could provide a personal choice exemption that is difficult to attain. The first option is problematic, but the latter two each has its own balance of costs and benefits, and the choice between them is not an easy one. Although state legislators ultimately decide which policy to enact, the second and third options also leave room for judicial involvement.

#### A. TIGHTENING RELIGIOUS EXEMPTIONS

New York has an exemption that requires the applicant to demonstrate—with potential judicial supervision—that her opposition to vaccines is both religious in nature and sincere.<sup>207</sup> One potential solution is to model other states' exemptions on New York, both in terms of the statutory language and in terms of the state's enforcement policy. Nothing would completely prevent people from getting a religious exemption with false pretenses (or lying in other ways), but adopting a law similar to New York's law could reduce the extent of misuse.

There are a number of problems with this approach, however. First, as Alicia Novak points out, inquiry by the state into the sincerity of a religious belief may be unconstitutional.<sup>208</sup> Novak points out that evaluating sincerity requires high levels of entanglement with the individual's beliefs, and may therefore violate the *Lemon* test.<sup>209</sup>

Note that no court has actually struck down an exemption that required a showing of sincerity. But it is extremely problematic to allow the state to police and evaluate religious beliefs. While I do not doubt the good faith of health department officials (although many of the anti-

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206. Alison Buttenheim et al., *Exposure of California Kindergartners to Students With Personal Belief Exemptions From Mandated School Entry Vaccinations*, 102 AM. J. PUB. HEALTH e59, e59–e60 (2012); Imdad et al., *supra* note 31, at 40; Omer et al., *Geographic Clustering*, *supra* note 31, at 1389; Amy Parker Fiebelkorn et al., *Measles in the United States During the Postelimination Era*, 202 J. INFECTIOUS DISEASES 1520, 1525 (2010).

207. *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651, 655 (E.D.N.Y. 1994).

208. Novak, *supra* note 57, at 1114–15.

209. *Id.*



vaccine activists do), it is easy—even with the best intent—to misuse such power, especially if the decisionmaker does not share the values of the exemption-seeking parent, which is almost always the case. Novak writes:

Under the sincerity test, the party desiring exemption must demonstrate to the satisfaction of the court that his or her asserted beliefs are “sincerely” held. Evidence a court might use in a sincerity analysis includes (1) whether the adherent acted inconsistently with the belief at issue; (2) whether the adherent materially gained by masking secular beliefs with a religious veneer; and (3) the religion’s history and size. Courts must further exercise “extreme caution” when conducting a sincerity analysis because the inquiry “in essence puts the individual on trial for heresy.” The court therefore becomes excessively involved and “entangled” in an analysis of an individual’s religious beliefs when it engages in a sincerity analysis. This excessive entanglement therefore does not satisfy the third prong of the *Lemon* test.<sup>210</sup>

In addition, any religious exemption invites people whose reasons for not vaccinating are not religious to lie to try to fit into the exemption, using one of the tried and true tactics mentioned in Part II—for example, joining a church for the purpose of obtaining an exemption or misrepresenting the real reason for opposing vaccination.<sup>211</sup> Even in New York, effective supervision varies among schools, with private schools occasionally having very lax oversight of exemptors’ reasons.<sup>212</sup> There is substantial likelihood that the end result of this approach is to privilege those who have the money, time, and sophistication to consult a lawyer before applying for an exemption. It also probably privileges the better or more sophisticated liars among those requesting exemptions. A policy that incentivizes people to lie, and rewards them for lying well—or places them in a bind if they do not—seems problematic. Not that it does not happen in a variety of contexts in our country, but when alternatives exist, it is probably not the best choice. Thus, I would not recommend tightening the religious exemption.

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210. *Id.* at 1114 (quoting *Sherr v. Northport-East Northport Union Free Sch. Dist.*, 672 F. Supp. 81, 94 (E.D.N.Y. 1987)).

211. In several places, attorney Alan Phillips, who specializes in vaccine-related issues, including in helping people obtain exemptions, mentions that “the law in this area is not consistent with most people’s common sense approach to the task. In my experience, most people who write a statement of religious beliefs opposed to immunizations on their own end up falling into one or more legal pitfalls that can cost them the exemption.” PHILLIPS, *supra* note 120, at 104. Perhaps unfairly, I interpret this to mean: since, for many of you, the real reasons for not wanting to vaccinate are not based on religious beliefs, but safety concerns, you may write something that reflects your true reasoning and not get a religious exemption.

212. Clint Rainey, *Immune to Logic: Some New York City Private Schools Have Dismal Vaccination Rates*, DAILY INTELLIGENCER (Mar. 30, 2014, 9:07 PM), <http://nymag.com/daily/intelligencer/2014/03/some-nyc-schools-show-dismal-vaccination-rates.html>.

## B. ONLY PROVIDE A MEDICAL EXEMPTION

Another way to address the problem would be for a state to abolish all exemptions other than a medical exemption. In other words, the only way a child may be sent to school without the required immunizations would be if that child had a medical reason—acknowledged by the state—not to get the vaccine. This option places the strongest limitation on parental autonomy, but may minimize the number of exempt children, reduce the chances of outbreaks, and protect the largest possible number of children against disease.

Dr. Paul Offit<sup>213</sup> of the Children's Hospital of Philadelphia is perhaps the most eloquent proponent of this approach. Offit sees religious exemptions as a wrong against, first and foremost, the unvaccinated children themselves, although also to those the unvaccinated children may infect. Describing an outbreak of measles in Philadelphia in 1991 that centered around two non-vaccinating churches, Offit criticizes the decision not to vaccinate and its cost in lives:

The nine who died were all children. Church members had made a decision for their own children as well as those with whom their children had come in contact.<sup>214</sup>

...

Children whose parents hold certain religious beliefs shouldn't be afforded less protection than other children. That the commonwealth has allowed children to die from measles, bacterial pneumonia, or leukemia in the name of religion is inexplicable. That it continues to allow such abuse in the face of recent deaths is unconscionable. Pennsylvania should repeal its religious exemptions for medical neglect. Otherwise, children will continue to suffer and die needlessly.<sup>215</sup>

This is a powerful argument. Most of us no longer see the harms of vaccine-preventable diseases. Offit does. As an Infectious Diseases Specialist, he often sees children suffering from diseases, including vaccine-preventable diseases. On occasion, he sees them die because their parents did not vaccinate them. It is not surprising that he sees the cost of non-vaccination as too high. Offit believes that every harm or death that can be prevented should be prevented. Since serious harms from vaccines are an order of magnitude less frequent than those stemming from the diseases themselves, and actually very rare indeed,<sup>216</sup> vaccinating is the best way to prevent harms to the children.

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213. *Paul Offit*, PAUL-OFFIT.COM, <http://paul-offit.com> (last visited Aug. 1, 2014); *About Paul Offit*, PAUL-OFFIT.COM, <http://paul-offit.com/about> (last visited Aug. 1, 2014).

214. Paul A. Offit, *End Religious Exemption*, PHILLY.COM (May 10, 2013), [http://articles.philly.com/2013-05-10/news/39144680\\_1\\_child-abuse-neglect-first-century-gospel](http://articles.philly.com/2013-05-10/news/39144680_1_child-abuse-neglect-first-century-gospel).

215. *Id.* Offit was talking about religious exemptions more broadly than vaccination.

216. *See supra* note 18 and accompanying text.

Providing only medical exemptions may minimize the number of exemptions overall, offering maximum protection to children and helping to prevent outbreaks. This comes with costs, though. The first cost is a loss of parental control. United States courts have long recognized the special role of parents as guardians and trustees of their children.<sup>217</sup> This is not just an acknowledgement of the parent's authority, and not just a matter of rights. General policies are designed at the population level. A specific child might have special needs. In the normal state of affairs, a parent would know their child's situation best and would passionately advocate for that child's interest. The best way to protect the child, usually, is to give the parent the autonomy to manage the child.

Since the parent also has the responsibility of raising, educating and disciplining the child, it is even more important for the parent to have the authority and ability to make basic decisions for the child. Especially when there is more than one right way to handle the child's affairs, we want to respect the parents' choices.<sup>218</sup>

On one hand, one could argue that this is not as strong an argument when applied to vaccines. As a general matter, for the vast majority of children—absent very specific medical issues—the risks of vaccinating are lower than the risks of not vaccinating, and the appropriate decision is to vaccinate. If rates of vaccination are high enough to offer herd immunity, that may not be true: a child may be able to hide in the herd and have very low chances of getting a disease even if unvaccinated, so the benefits become slight.<sup>219</sup> The problem is that this argument only holds up if only a small number of families do not vaccinate, since, as the number of unvaccinated children increases, the protection of herd immunity is undermined. Additionally, limiting exemptions to this extent may generate resistance, or may cause parents with very strong opposition to vaccines to lie, or act in other harmful ways.

Are the courts likely to abolish religious exemptions without legislative instructions? Parental rights do get substantial legal protection in our system. For example, courts have, in the past, upheld parental rights to remove children from mandatory schooling at a certain age, as previously discussed.<sup>220</sup> In one case, the Arizona Court of Appeals allowed a mother to exempt a nine-month-old from immunization on religious grounds even after the mother was found unfit to have custody

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217. ROBERT H. MNOOKIN & D. KELLY WEISBERG, *CHILD, FAMILY, AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW* 131 (6th ed. 2009).

218. See *Pierce v. Society of Sisters*, 268 U.S. 510, 534–35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

219. Diekema, *supra* note 13, at 92–93; Susan van den Hof et al., *Measles Epidemic in the Netherlands, 1999–2000*, 186 J. INFECTIOUS DISEASES 1483, 1483–86 (2002).

220. *Wisconsin v. Yoder*, 406 U.S. 205, 207 (1972).

of the infant, upholding the balance the legislature set between parental rights and the child's, and the public health (over a powerful dissent).<sup>221</sup> In the only case in which a court found that a parent's failure to vaccinate a child constituted medical neglect—*In re Christine M.*<sup>222</sup>—the context, during a measles outbreak, was unique. Further, the court declined to order that the child be vaccinated because by the time the case arrived before it, the outbreak had ended.<sup>223</sup> In other words, the court required the danger to be very immediate to order vaccination.

That would be a difficult case to make today: thanks to the success of our vaccination programs, many of the diseases are rare, so the chances of contracting them are low and the harm may not seem immediate.<sup>224</sup> While all of the diseases we vaccinate against can kill, some kill only rarely (like chicken pox). This reality is part of the reason the *Diana H. v. Rubin* court declined to order the immunization of the child over the objection of the mother, even though the mother was found unfit. The court held that there was no evidence that leaving the child unimmunized was an “imminent” danger to her health.<sup>225</sup>

Similarly, while Novak suggests that some religious exemptions may violate equal protection, that position has not been upheld so far. Even Novak acknowledges that, at least, form exemptions would not fail the *Lemon* test.<sup>226</sup> An argument can be made, under the *Lemon* test, that a religious exemption has no secular purpose. But there is at least one such purpose: allowing children to attend schools even if their parents object to immunizations. It is possible, but unlikely, that courts will strike down religious and philosophical exemptions and only leave medical exemptions.<sup>227</sup>

The legislature, however, may do so, but the question is whether legislatures will. Legislators may hesitate to step on parental rights or to infringe on religious freedoms, whether from a mistaken belief that such interference would be unconstitutional or from a genuine respect for such beliefs. And they may fear the political battle that abolishing exemptions would inevitably cause. But even legislators sympathetic to the rights of religious minorities may reconsider if the exemption is broadly abused—especially if the number of outbreaks increases.

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221. *Diana H. v. Rubin*, 171 P.3d 200, 205–206 (Ariz. Ct. App. 2007). *But cf.* *Dep't of Human Servs. v. S.M.*, 300 P.3d 1254, 1261–62 (Or. Ct. App. 2013).

222. *In re Christine M.*, 595 N.Y.S.2d 606, 617–19 (N.Y. Fam. Ct. 1992).

223. *Id.* at 618.

224. CTRS. FOR DISEASE CONTROL & PREVENTION, *Notifiable Diseases and Mortality Tables*, 62 MORBIDITY & MORTALITY WKLY. REP. ND-719, ND-719 tbl.1 (Jan. 3, 2014).

225. *Diana H.*, 171 P.3d at 208.

226. Novak, *supra* note 57, at 1115.

227. It was done in Mississippi, but that was over thirty years ago. *Brown v. Stone*, 378 So.2d 218, 221–23 (Miss. 1979).

## C. PERSONAL BELIEF EXEMPTION ONLY

Another alternative is to remove the religious exemption and only have a “personal choice” exemption. At least seventeen states currently offer a philosophical exemption or a personal belief exemption.<sup>228</sup> The terminology, however, is troubling. “Philosophical” seems wrong, and while there is an element of belief in choosing not to get a vaccine—usually belief in misinformation or conspiracy theories—personal belief seems to suggest something quasi-religious. The language, instead, should focus on the fact that it is a “personal choice” exemption. A personal choice exemption has the benefit of allowing the state to admit that some of its citizens are opting out of the immunization requirement for whatever reason they choose, be it based on religion, fear, or not wanting to be bothered to take the child to the doctor’s office. In other words, people do not have to lie about their reasons: they do not have to give such reasons.

One concern when a state adopts a personal choice exemption is that people will use the exemption for convenience only.<sup>229</sup> Getting a child vaccinated requires some effort—at the very least, the patient needs to go to a doctor’s office, potentially causing the parent to miss work or at least spend time that could be used elsewhere. And watching a child injected with a vaccine—something most children do not appreciate—is not fun. In some jurisdictions, all a personal belief exemption requires is a signature on a form or letter explaining the objection—much easier than going to a doctor.<sup>230</sup> A similar concern is that parents will decide not to vaccinate due to concerns raised by friends or because it is the norm in their social circle,<sup>231</sup> without giving the matter sufficient thought or considering the risks. At least one commentator pointed out that the choice not to vaccinate should require at least as much effort as the choice to vaccinate to avoid such problems.<sup>232</sup>

There are good reasons to prefer a personal choice exemption to a religious one, and possibly even over the provision of only a medical exemption. Some people sincerely see vaccines as toxic.<sup>233</sup> Faced with a

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228. Lu, *supra* note 45, at 886.

229. Silverman, *supra* note 80, at 285; Calandrillo, *supra* note 7, at 360.

230. Calandrillo, *supra* note 7, at 357. See, e.g., ARIZ. REV. STAT. ANN. § 15-873 (2014) (West); ME. REV. STAT. tit. 20-A, § 6355 (2014).

231. For research highlighting the importance of social networks on the decision to vaccinate, see generally Emily K. Brunson, *The Impact of Social Networks on Parents’ Vaccination Decisions*, 131 PEDIATRICS 1397 (2013).

232. Silverman, *supra* note 80, at 294.

233. Christina England, *This Study Reveals Children Are Being Vaccinated With Toxic Levels of Aluminum Causing Neurological Damage and Autism*, VACTRUTH (Jan. 28, 2014), <http://vactruth.com/2014/01/28/toxic-levels-of-aluminum>; Dan Olmsted & Mark Blaxill, *The Age of Polio: How an Old Virus and New Toxins Triggered a Man-Made Epidemic—Part 1, The Wrong Narrative*, AGE OF AUTISM (Sep. 19, 2011, 5:45 AM), <http://www.ageofautism.com/2011/09/the-age-of->

medical exemption alone, people who hold such beliefs may face the choice between homeschooling, falsifying medical documents, lying in some other way, or vaccinating their children with what they believe are toxins. It seems problematic to adopt a policy that may encourage people to lie, in terms of falsifying records. The counter to this, of course, is that altering the law to fit irrational beliefs, unsupported by the evidence is also problematic. However, forcing people to do something that they think will poison their children—however irrationally—is almost bound to be counterproductive and lead to other problems.

In addition, coercion can generate resistance.<sup>234</sup> A system of school immunization requirements with no safety valve can be politically unappealing, difficult to put into effect, and vulnerable to political attack—even among those who are not anti-vaccine. Having a way to opt out of the requirement could help mitigate that resistance—yes, it is still an obligation, but those who truly do not want to comply have choices.

Finally, homeschooling may present its own challenges. Homeschooling means a child's education is dependent on the parent's ability to educate that child. This may have a disproportionate negative effect on children whose parents are not as well suited to the task. The fact that a parent chose not to protect the child against preventable diseases is not a good reason to deprive that child of state-sponsored public education. Allowing an exemption, even one that is difficult to obtain, still respects parental autonomy: parents have the choice to exempt their children from vaccines, even if they have to meet certain criteria to do so.

The risk, of course, is that allowing parents to request an exemption for any reason could increase the rates of exemptions (which have been rising)<sup>235</sup> and lead to more outbreaks. Some parents may take the exemption because of anti-vaccine views, others because of convenience, as discussed. If the process of getting an exemption is easier than immunization, we might have a problem.<sup>236</sup>

Legislatures in several states have proposed laws that would make personal choice exemptions more difficult to obtain while still leaving them intact. Ross Silverman, for example, proposed what he refers to as “informed refusal.”<sup>237</sup> Silverman's proposal was enacted into law by

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polio-how-an-old-virus-and-new-toxins-triggered-a-man-made-epidemic.html; Jake Crosby, *Discovering I Was Toxic*, AGE OF AUTISM (Jan. 14, 2009, 5:45 AM), <http://www.ageofautism.com/2009/01/discovering-i-was-toxic.html>.

234. FRANK P. GRAD, PUB. HEALTH LAW MANUAL 72–73 (2005). See generally Jason L. Schwartz, Commentary, *Unintended Consequences: The Primacy of Public Trust in Vaccination*, 107 MICH. L. REV. FIRST IMPRESSIONS 100 (2009).

235. Blank et al., *supra* note 32, at 1282–90.

236. Silverman, *supra* note 80, at 293.

237. *Id.* at 285.

several states, including Washington,<sup>238</sup> California,<sup>239</sup> and Oregon.<sup>240</sup> “Informed refusal” requires that, “[p]rior to receiving an exemption, applicants [ ] meet with a health professional . . . to discuss the relative risks and benefits of immunization and exemption. This interaction would need to be memorialized on a standardized form.”<sup>241</sup>

Again, the requirement in states that have adopted Silverman’s proposal is pretty minimal. All they require is a signature by a health provider confirming that the exemptor had the benefits and risks of vaccines explained to her (in Washington, the exemptor can instead watch a video). And still, the anti-vaccine organizations fought these statutes tooth and nail.<sup>242</sup>

Offit suggested a somewhat more intense educational requirement—“attending educational classes that teach the public what the safety profiles of different vaccines are, before they are allowed to opt out of vaccination.”<sup>243</sup> A somewhat rigorous educational requirement seems appropriate, potentially with a short quiz at the end. Such quizzes are used for verifying informed consent in some clinical trials, and may be useful here to assure internalization of the facts.

In both cases, the hope is that some kind of informed consent requirement would eliminate exemptions of convenience and ensure that parents have complete information about the risk they would be taking before choosing not to vaccinate a child.

Silverman also suggests that the exemption should be renewed—maybe not annually, but occasionally.<sup>244</sup> An annual requirement is not unheard of, though it is not common: Arkansas requires parents using a religious exemption to go through the application process annually. Arkansas’ process requires a notarized statement requesting the religious/philosophical exemption; completion of an educational component; an informed consent that includes a signed statement of refusal to vaccinate; and a signed statement of understanding that the department may remove the child from school during outbreaks.<sup>245</sup>

Making the exemption process demanding will involve a political battle; but then, so would eliminating all but non-medical exemptions. For this reason, it seems to me the best option.

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238. WASH. REV. CODE ANN. §§ 28A.210.080–210.090 (West 2014).

239. CAL. HEALTH & SAFETY CODE § 120325 *et seq.* (West 2014).

240. OR. REV. STAT. § 433.267 (2014).

241. Silverman, *supra* note 80, at 285.

242. As mentioned previously, Governor Jerry Brown, from California, instructed the California Health Department to add an exemption for religious reasons. *See* Reiss, *supra* note 46.

243. Priya Shetty, *Experts Concerned About Vaccination Backlash*, 375 LANCET 970, 971 (2010).

244. Silverman, *supra* note 80, at 294.

245. ARK. CODE ANN. § 6-60-504(b) (2014).

## CONCLUSION

In 2008, after many years of low numbers of measles infections, the United States saw 140 cases of measles.<sup>246</sup> Of the 131 cases reported through July, ninety-one percent of the victims were unvaccinated or had an unknown vaccination status.<sup>247</sup> In 2011, the United States saw 222 cases of measles. Eighty-six percent of those sick were unvaccinated or had an unknown vaccination status.<sup>248</sup> Between January 1 and August 24, 2013, the United States saw 159 cases of measles: eighty-two percent of those infected were unvaccinated or of unknown vaccination status.<sup>249</sup> This is in spite of the fact that MMR coverage stands at over ninety-four percent.<sup>250</sup> While a far cry from the many cases a year pre-vaccine,<sup>251</sup> it is a change, and not for the better.

As immunization rates drop, diseases may come back. Measles is an extremely contagious disease—it comes back among the first, and targets first and foremost the unvaccinated. Whooping cough has also made a reappearance. While its return is, at least in part, because of a vaccine that is less effective than scientists expected, outbreaks of whooping cough are more prevalent in communities with low vaccination rates.<sup>252</sup> HiB outbreaks were also seen, again, primarily in the unvaccinated.<sup>253</sup>

As outbreaks reappear, states may seek to increase vaccination rates. School immunization mandates are an extremely effective tool to achieve that goal,<sup>254</sup> and it is natural for states to reconsider their exemption policies if they lead to outbreaks. This may explain a recent study that examined legislative bills related to vaccine exemptions proposed by states between 2009 and 2012. The study found that while most bills (thirty-one out of thirty-six) aimed to expand exemptions and only five aimed to restrict them, none of the bills proposing to expand exemptions passed, while three out of five proposing restrictions were enacted into law.<sup>255</sup> This suggests that states may already be moving in

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246. CTRS. FOR DISEASE CONTROL & PREVENTION, *Measles—United States, January 1–August 24, 2013*, 62 MORBIDITY & MORTALITY WKLY. REP. 741, 741 (2013) [hereinafter *Measles, January 1–August 24*].

247. CTRS. FOR DISEASE CONTROL & PREVENTION, *Update: Measles—United States, January–July 2008*, 57 MORBIDITY & MORTALITY WKLY. REP. 893, 893 (2008).

248. CDC, *Measles 2011*, *supra* note 97.

249. *Measles, January 1–August 24*, *supra* note 246.

250. CTRS. FOR DISEASE CONTROL & PREVENTION, *Vaccination Coverage Among Children in Kindergarten—United States, 2011–12 School Year*, 61 MORBIDITY & MORTALITY WKLY. REP. 647, 647 (2012).

251. *See generally* Roush & Murphy, *supra* note 8.

252. Blank et al., *supra* note 32, at 1282. *See generally* Lara K. Misegades et al., *Association of Childhood Pertussis with Receipt of 5 doses of Pertussis Vaccine by Time Since Last Vaccine Dose, California, 2010*, 308 JAMA 2126 (2012); Omer et al., *Geographic Clustering*, *supra* note 31, at 1389–96.

253. OFFIT, *DEADLY CHOICES*, *supra* note 11, at xi–xii.

254. Orenstein & Hinman, *supra* note 14, at s23.

255. Omer et al., *Legislative Challenges*, *supra* note 37, at 621.



the direction of limiting the ability of parents to opt out of vaccinating their children.

The religious exemption, as it currently stands, is easily and often abused. It does not sufficiently protect children against their parents' decision not to vaccinate them, and it does not sufficiently protect communities against outbreaks. Reconsidering its existence is an appropriate step for states seeking to improve immunization rates to take. Replacing it with an appropriately narrow personal choice exemption is one option; leaving only medical exemptions is another, though it is more problematic.

Abolishing the religious exemption will not be easy. It will involve a political battle. But leaving things as they are carries substantial risks. Many states, seeing an increase in preventable diseases, with their attendant suffering, harms, deaths, and costs, may wish to take that step.

## APPENDIX A: SCREENSHOTS OF FACEBOOK COMMENTS

FIGURE 1



FIGURE 2

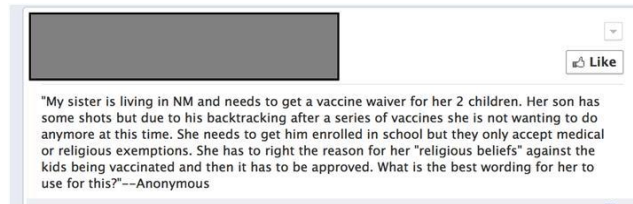


FIGURE 3

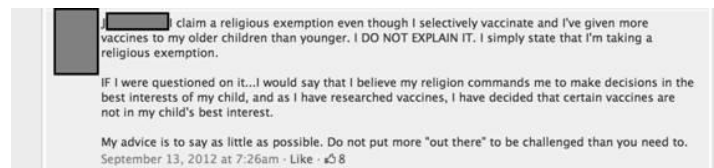


FIGURE 4

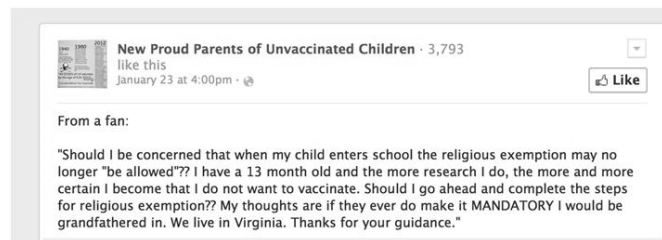


FIGURE 5

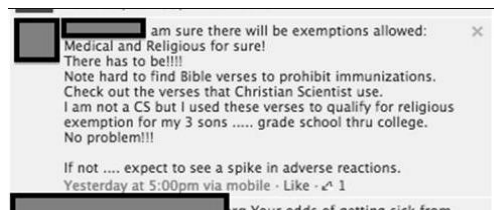


FIGURE 6

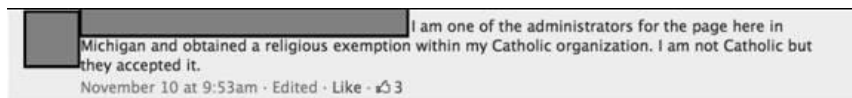


FIGURE 7

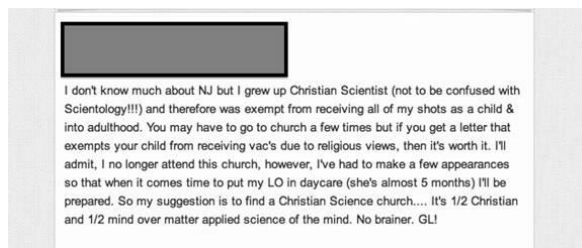


FIGURE 8

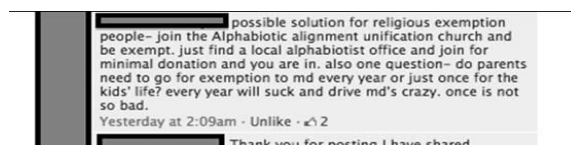


FIGURE 9

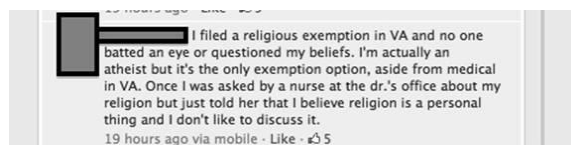


FIGURE 10



FIGURE 11



FIGURE I2

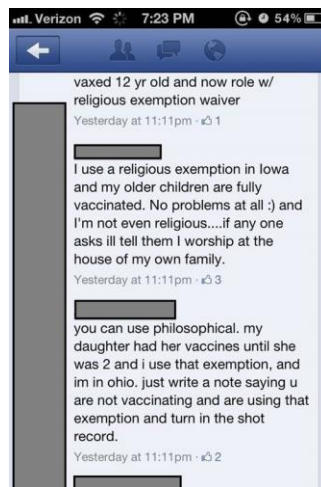


FIGURE I3

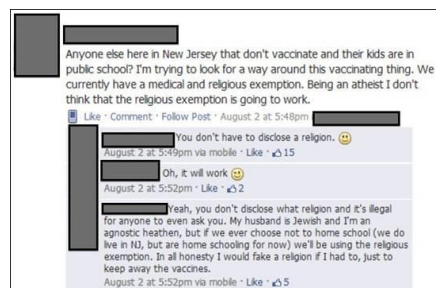


FIGURE I4

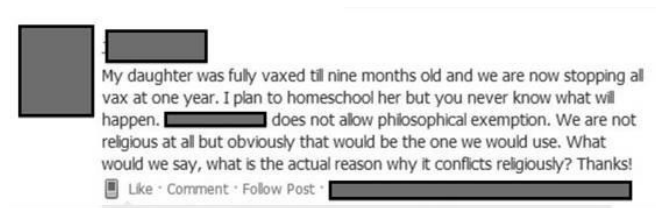


FIGURE I5



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